38TH ANNUAL WORKERS COMPENSATION SEMINAR

PREVAILING FACTOR - A CLAIMANT'S PERSPECTIVE

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The prevailing factor defense will be raised often in cases where there are pre-existing injuries or health conditions. A review of the Board's decisions of the past twelve months confirms this as more than half of the decisions involve fact situations where claimant has a pre-existing health condition or injury. The existence of a pre-existing medical condition or injury may raise not only a prevailing factor defense but may also create companion issues relating to "arising out of and in the course of employment" as modified in the new act in 44-508(f)(2). Specifically, these additional issues, in addition to prevailing factor, may include:

A. The injury is not compensable "solely because it aggravates, accelerates or exacerbates a pre-existing condition." K.S.A. 44–508(f)(2).

B. The injury is not compensable because the accident was only a "triggering or precipitating factor." K.S.A. 44–508(f)(2).

C. The injury is not compensable if it "renders a pre-existing condition symptomatic." K.S.A. 44–508(f)(2).

Counsel for claimants must anticipate these issues when evaluating potential cases, obtaining medical reports and providing testimony.

In reviewing the first year's cases under the new act, several observations are important. First, claimant will almost always need a prevailing factor medical opinion. Although it is true that such a report is not required and that K.S.A. 44–508(g) provides that the ALJ shall consider all relevant evidence in determining what constitutes a prevailing factor, a review of the cases indicate that a party is generally at a disadvantage if they do not have a specific prevailing factor opinion.

For example, in *Cutchlow v. University of Kansas Hosp. Authority*, Docket No. 1,057,361, claimant at preliminary hearing had EMG evidence of moderate bilateral carpel tunnel however "the physician who performed test expressed no opinion about what caused the condition." Additionally, the claimant did not testify as to any causal connection of his symptoms to his work duties. In ruling against claimant, the Board Member noted "there is no medical opinion in evidence that there exists the requisite causal connection between claimant's job requirements and the bilateral entrapment of claimant's median nerves." (Emphasis added). (At p. 8).

Similarly, in *Dominguez-Rodriguez v. Amarr Garage Doors*, Docket No. 1,058,613, claimant injured his back pushing a cart containing garage door panels. At the preliminary hearing, the only prevailing factor opinion was that of Dr. Prostic on behalf of claimant. In ruling against the respondent, the Board Member noted:

> The only medical provider that addressed the issue of whether claimant's accident on November 7, 2011, was the prevailing factor in causing his injury was Dr. Prostic. His opinion was that claimant's accident was indeed the prevailing factor causing claimant's injury and his need for treatment. The opinion was not controverted by another physician. Accordingly, this Board Member finds that claimant's accident was the prevailing factor causing claimant's injury and his need for treatment. (Emphasis added). (at page 8).

Second, you must be able to present a credible fact pattern and medical history on behalf of claimant. It is important to obtain all relevant records relating to claimant's medical history. Incomplete or inaccurate medical histories not only diminish your client's credibility the will also weaken your prevailing factor medical report. See *Sheppard v. Big Lakes Developmental Center, Inc.*, docket #1,058,184 and *West v. LaFarge Corporation*, Docket #1,058,902, for examples of cases where the claimant presented incomplete medical histories and inconsistent testimony resulting in adverse findings.

Third, if there are pre-existing injuries or health conditions, it is best that the condition is asymptomatic and significantly pre-dates the current injury. If the pre-existing condition is symptomatic, testimony and medical records showing that the condition is stable is helpful. However, as discussed below, the best evidence is pre and post-injury objective testing that demonstrates a new separate and distinct injury.

In cases where there is a pre-existing injury or health condition, focus on developing the new injury as separate and distinct from the pre-existing condition and occurring as the result of a single accident at a specific time and place. This approach is found in some of the Board decisions and focuses on the statutory definition of an injury. For example, K.S.A. 44–508(d) provides that the accident must be the prevailing factor in causing the injury. The definition of an accident includes that it be "identifiable by time and place of occurrence." Injury is defined as any lesion or change in the physical structure of the body, causing damage or harm thereto. K.S.A. 44–508(f)(1). Evidence of a new injury can be found in a comparison of pre-injury and post-injury MRIs, x-rays or other diagnostic tests. Thus, a change in the physical structure of the body, even within a pre-existing condition, that occurs as a result of an accident occurring at a

specific time and place is arguably a new compensable injury.

For example, in *Yarbro v. First America*, Docket #1,056,623, the Board Member held that new impingement symptoms over pre-existing asymptomatic degenerative neck disease is a new injury. In this case a 70-year-old bus driver was rear-ended by a drunk driver causing immediate low back and neck pain. An MRI of the cervical spine demonstrated significant pre-existing and degenerative changes in his cervical spine including spondylolisthesis, bulging disks, spinal canal and neural foraminal narrowing and apparent compression of the cord. The authorized physician diagnosed claimant with "fairly significant cervical stenosis at C5–6 and recommended that claimant undergo a cervical decompression and multilevel fusion at C4–5, C5-6 and C6-7."

Claimant testified he had not seen a doctor nor had any pre-existing symptoms relative to his neck before the collision. The authorized treating surgeon opined that the motor vehicle accident was the prevailing factor for his current complaints and that he could end up paralyzed if he did not have surgery. There were no other medical opinions. Respondent argued that the collision only "rendered a pre-existing condition symptomatic." K.S.A. 44–508(f)(2). The ALJ concluded "after the accident the evidence indicates claimant now has impingement causing numbness and weakness in his arm. That is a change in his physical structure causing harm." The Board Member affirmed the ALJ's conclusions and held that claimant had met his burden of proof establishing that he suffered accidental injury arising out of and in the course of his employment and the accident was the prevailing factor in causing the injury, medical condition and disability.

Similarly, in *Ragan v. Shawnee County*, Docket #1,059,278, the Board Member

concluded the progression of a pre-existing partial rupture of a wrist ligament to a complete rupture due to a work-related event was a new accident. In this case, claimant had a prior partial rupture of the scapholunate ligament to his left wrist that later resolved. He subsequently sustained a complete rupture of the scapholunate ligament while making a sharp turn operating a trash truck. There were no prevailing factor opinions. The Board Member found the current accident "is simply when the last shreds of the remaining support for his scaphoid gave way" and constituted a change in the physical structure of his wrist and held the subsequent injury was the prevailing factor in causing claimant's current injury.

There are other decisions notable for finding a new injury superimposed over a pre-existing injury or health condition:

In *Homan v. U.S.D. #259*, Docket #1,058,385, the Board Member concluded a cartilage tear superimposed over pre-existing carpel tunnel was a new injury. In this case, claimant injured her left wrist unloading a wheelchair-bound student from a school bus. Claimant had previously tested positive for bilateral carpal tunnel syndrome and the authorized treating physician stated the accident "possibly" aggravated the pre-existing condition. Claimant's physician stated the current accident was the prevailing factor in aggravating the pre-existing carpal tunnel and causing a tear in the triangular fibrocartilage. The Board Member held plaintiff met her burden of proof to establish she suffered actual injury arising out of and in the course of her employment and such accident was the prevailing factor in causing her injuries.

In *Fisher v. Olathe Ford's Sales, Inc.*, Docket #1,057,789, the Board Member concluded a subsequent neck strain superimposed over a pre-existing fusion was a new accident. In this case, claimant had previously underwent a cervical diskectomy and fusion but was able to return

to work performing auto body repairs with no problems. Approximately six years later, claimant suffered additional injury to his neck while carrying a truck door. Subsequent testing revealed claimant had sustained a broken cervical screw and disrupted pseudoarthrosis (fibrous union). Additionally, two authorized medical providers stated claimant had also sustained a cervical strain. Respondent's treating physician stated the fracture of the screw was not related to claimant's current injury. Claimant's medical expert stated it would be speculative to state that the broken screw was a result of the accident but, more likely than not, it did disrupt the prior pseudoarthrosis. The ALJ denied benefits stating these injuries could only arise because of claimant's prior cervical fusion and therefore arose out of a risk personal to the claimant. The Board Member reversed in part holding that the cervical strain was a new injury resulting from the subsequent work accident.

In *McIntosh v. Goodyear Tire & Rubber Co.*, Docket #1,057,563, the Board Member concluded the progression of a previous bulging disk to a herniated disk with impingement as a result of the work-related accident constituted a new injury. In this case, claimant had prior episodic treatment for low back pain with radicular symptoms in 2006, 2007, 2008, 2009 & 2010. His treatments included injections, pain patches, a TENS unit and physical therapy. An MRI performed on 11/20/09 revealed a L5–S1 mild bulging disk. Claimant testified he had a nearly full recovery following each of these exacerbations.

In 2011 claimant sustained a "jolt" to his back while operating a forklift. A subsequent MRI demonstrated the L5-S1 disk was now moderately bulging with protrusion of disk material at the nerve root (a herniation). The ALJ denied benefits holding the current injury only rendered his pre-existing condition symptomatic.

Reversing the ALJ, the Board Member concluded "the accident did not merely aggravate a pre-existing condition as claimant did not have a herniated disk before the subsequent accident at work" and noted the uncontroverted medical evidence of Dr. Hopkins that the work event was the direct and prevailing factor not only in causing the disk injury but also in causing his need for medical treatment, work restrictions and his current impairment.

In *Tindall v. Associated Wholesale Grocers, Inc.*, Docket No. 1,059,684, the Board Member concluded a subsequent work-related full thickness rotator cuff tear over pre-existing degenerative changes constituted a new injury. In this case, claimant sustained a full thickness rotator cuff tear when he reached to pry out a case of product wedged in a trailer. The treating surgeon stated it was "indisputable" that the work event did not cause the tear.

Claimant's medical expert testified that there were certainly degenerative changes and that at least half of the male population beyond the age of 50 has similar changes. However, he further testified the degenerative changes were in addition to the torn tendons and not the tendon tear themselves. He further stated claimant's 31 years of heavy repetitive work culminating with the injury of 2/1/12 are the prevailing factor in causing his current medical condition and need for treatment. The Board Member accepted the testimony of claimant's medical expert and awarded benefits.

There were other notable decisions from the Board in these last twelve months. In *Brandon v. Farmers Insurance Group* below, a Board Member soundly rejected the testimony of respondent's medical expert that computer keyboarding cannot be the prevailing factor in causing carpal tunnel syndrome. And in *Cotes v. State of Kansas*, also below, the Board Member addresses ADL and neutral risk defenses.

In *Brandon v. Farmers Insurance Group*, Docket #1,058,735, a vigorous prevailing factor defense was raised by respondent concerning whether computer keyboarding can cause carpal tunnel syndrome. Claimant's job duties required her frequent use of a computer and keyboard. She developed upper extremity symptoms that were ultimately diagnosed by EMGs and nerve conduction studies as bilateral carpal tunnel syndrome.

Respondent's medical expert opined that claimant's work activities may have been an aggravating factor in the presentation of her carpal tunnel, "there is no evidence that keyboard activities would be considered the prevailing cause." (P. 4). Respondent's physician ascribes to a medical philosophy that the etiology carpal tunnel syndrome is primarily structural, genetic and/or biological and therefore more causally related to gender, age and obesity. Claimant's medical expert gave a detailed explanation as to how repetitive work can cause carpal tunnel syndrome and concluded that claimant's work activities were the "direct, proximate, and prevailing factor" in causing her bilateral carpal tunnel.

The Board Member concluded that the position of respondent's physician was too rigid and not supported by other medical research which demonstrated a correlation between the development of carpal tunnel syndrome and repetitive use. The Board Member also noted claimant's testimony causally connecting the work activities to her symptoms was credible. Accordingly, the decision of the ALJ awarding benefits was affirmed.

In *Coates v. State of Kansas*, Docket #1,057,719, claimant "rolled his right ankle" sustaining injury while hurriedly carrying two bags of trash down a flight a stairs. Respondent argued taking out trash is a normal day-to-day activity and therefore not compensable as an activity of daily living.

Relying on *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 595–96, 257 P. 3rd 255 (2011), the Board Member notes that claimant's job duties require him to take out the trash and therefore the activity is not an ADL in this context. The decision also concludes that claimant was not engaged in a neutral risk but rather an activity associated with his job citing *Bryant*:

> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement - bending, twisting, lifting, walking, or other body motions- but looks to the overall context of what the worker was doing - welding, reaching for tools, getting in or out of a vehicle, or engaging in other work–related activities. (Bryant at 596).

However, see *Graves v. Professional Service Industries, Inc.*, docket No. 1,059,190, where similar facts resulted in an opposite conclusion by the Board Member.

PREVAILING FACTOR - A CLAIMANT'S PERSPECTIVE

INDEX OF CASES

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVEN D. CUTCHLOW Claimant	)	
VS.	)	
UNIVERSITY OF KANSAS HOSPITAL AUTHORITY Respondent	)	Docket No. **1,057,361**
AND	)	
SAFETY FIRST INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the November 14, 2011, preliminary hearing Order entered by Administrative Law Judge

The record on appeal is the same as that considered by the ALJ, consisting of the transcript of the September 13, 2011, preliminary hearing; the transcript of the November 8, 2011, preliminary hearing, with exhibits; and all pleadings contained in the administrative file.

ISSUES

The Administrative Law Judge (ALJ) found that claimant sustained a series of repetitive accidents to his bilateral upper extremities arising out of and in the course of the performance of his regular job duties through his last day of work for respondent, April 26, 2011. The ALJ held that the amendments to the Kansas Workers Compensation Act which became effective on May 15, 2011, (New Act) are inapplicable to this claim. The ALJ found that the date of claimant's accident under the law in effect before May 15, 2011, (Old Act) was August 2, 2011, and that respondent received timely notice of the alleged work-related accidents. The ALJ awarded claimant medical treatment.

Respondent requests review of whether claimant sustained repetitive injuries to his bilateral upper extremities arising out of and in the course of his employment with

respondent. Respondent contends that no medical evidence was offered indicating that claimant's use of his hands and arms at work caused his bilateral carpal tunnel syndrome. Respondent also contends claimant failed to provide timely notice of the alleged series of repetitive traumas. In that regard, respondent argues the ALJ incorrectly fixed claimant's date of accident as August 2, 2011, and further incorrectly found that the Old Act applies to this claim. Respondent maintains the New Act applies and that thereunder claimant's date of accident is the date the claimant last worked, April 26, 2011. Respondent argues that claimant's notice is untimely under the notice provisions of the New Act.

Claimant argues that the claim is not covered under the New Act but is instead governed by the Old Act because claimant's last day of work was on April 26, 2011, before the New Act became effective. Claimant also asserts that he provided timely notice of his alleged repetitive accidents pursuant to the Old Act. Finally, claimant maintains that the preponderance of the credible evidence supports the ALJ's finding that claimant's bilateral carpal tunnel syndrome arose out of and in the course of his employment with respondent.

FINDINGS OF FACT

Having reviewed the entire evidentiary record this Board Member makes the following findings of fact and conclusions of law:

Claimant was age 53 on the date of the November 8, 2011, preliminary hearing. He had worked for respondent for approximately 31 years. For the past 20 years he worked as a radiology tech assistant. Claimant was a full-time employee and he worked daily shifts of 8 1/2 hours. His job required him to lift patients; work on the computer; run film in the processors; and transport patients in wheelchairs and carts. He said he used his hands and arms "[j]ust about all day."[1] The amount of time he worked on a computer averaged 5 1/2 hours per day.

Claimant offered into evidence a written job description for radiology assistant which had been signed by claimant and his supervisor on June 15, 2010.[2] The job description indicates that claimant had to lift up to 40 pounds; push over 250 pounds; perform duties requiring manual dexterity; and reach below and above shoulder level. His last day of work for respondent was April 26, 2011.[3] Claimant gave written notice of his alleged repetitive bilateral carpal tunnel injuries on July 31, 2011, or August 1, 2011.

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[1] P.H. Trans., at 11.

[2] P.H. Trans., Ex. 1.

[3] Claimant was terminated by respondent under a point system for excessive absenteeism. P.H. Trans., at 9.

The only medical evidence is a report of an EMG/NCV test performed on July 25, 2011. The referring physician was a cardiologist whom claimant consulted on his own, Dr. George Pierson. The EMG report indicates that claimant presented with complaints of bilateral upper extremity pain and paresthesias for over one year. There is no history in the report regarding how claimant's symptoms developed. No mention is made of claimant's work as either causing or aggravating his symptoms. The report confirms the presence of moderate bilateral carpal tunnel syndrome; however, the physician who performed the test, Dr. Stephen Rosenberg, expressed no opinion about what caused the condition.

Claimant did not testify what effect, if any, his work had on his upper extremities. Claimant did not testify that he associated his pain and numbness with the work he performed for respondent. On the contrary, claimant thought the problems with his hands might have been related to his heart, which presumably prompted him to consult a cardiologist.

Claimant has neither been taken off work nor provided with light duty restrictions by any authorized physician. No doctor provided claimant with a diagnosis in writing indicating that his injuries were work-related.

PRINCIPLES OF LAW

Old Act

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[4] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[5]

[4] K.S.A. 2010 Supp. 44-501(a).

[5] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[6]

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2010 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be

[6] *Id.* at 278.

the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

New Act[7]

L. 2011, ch. 55, sec. 1 provides in relevant part:

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, ch. 55, sec. 5 provides:

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record *unless a higher burden of proof is specifically required by this act.*

L. 2011, ch. 55, sec. 5 also provides in relevant part:

(d) "Accident" means an undesigned, sudden and unexpected *traumatic* event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. *An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.*

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

[7] The italicized portions represent language added to the statutes quoted.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f) (1) "Personal injury" and "injury"mean any lesion or change in the physical structure of the body, causing damage or harm thereto. *Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.*

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(I) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

L. 2011, ch. 55, sec. 16 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of *injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:*

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

This Board Member finds claimant has not satisfied his burden of proof to persuade the trier of fact by a preponderance of the credible evidence that it is more probably true

than not true that he sustained personal injury by accident, or by a series of repetitive accidents, arising out of and in the course of his employment with respondent.

There is no evidence in this record which establishes that claimant's bilateral carpal tunnel syndrome was caused by his job for respondent. There is no medical opinion in evidence that there exists the requisite causal connection between claimant's job requirements and the bilateral entrapment of claimant's median nerves. The report of the EMG testing supports the finding that claimant has moderate bilateral carpal tunnel syndrome. However, that report contains no reference to claimant's job and makes no connection between claimant's employment and the onset of his upper extremity pain and paresthesias. Claimant's testimony that his job duties required frequent use of his upper extremities is corroborated by the written job description and undoubtedly carpal tunnel syndrome can be caused by repetitive use of the upper extremities. However, carpal tunnel syndrome can have a variety of etiologies.

Claimant contends the Board's decision in *Hamilton*[8] supports the ALJ's finding in this claim that claimant successfully proved personal injury by accidents arising out of and in the course of employment. In *Hamilton*, the Board's Order quotes the ALJ in finding the claim compensable:

> There were no medical reports stating whether the claimant's carpal tunnel was work related or not. The claimant associated her hand problems with her job duties, and the claimant's testimony itself is substantial evidence of causation. The kind of activities she described with the spray bottles and the pressure washer wand are grasping activities commonly seen in workers compensation carpal tunnel claims. Even if the activity was as little as 2 hours per day, as suggested by Mr. Zari, it seems plausible that the activity caused the hand symptoms, as the claimant alleged. There was no evidence of another source for the claimant's carpal tunnel syndrome.[9]

The fallacy in claimant's reliance on *Hamilton* is that Ms. Hamilton associated her hand problems with her job duties. There is no such evidence in this record. Mr. Cutchlow briefly described his job, but he did not describe whether or how his symptoms were related to his work for respondent.

The parties vigorously argue the issue of what "date of accident" should be assigned to this claim and whether the matter is governed by the Old Act or the New Act. However, those issues need not be decided because claimant has failed to sustain his burden of

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[8] *Hamilton v. Fabric Print, Inc.*, No. 1,035,257, 2007 WL 3348551 (Kan. WCAB October 9, 2007). (*Hamilton* involved a preliminary order, so only one member of the Board determined the outcome of the review.)

[9] *Id.* at 2.

proof under both the Old Act and the New Act that his bilateral carpal tunnel syndrome arose out of and in the course of his employment. It is also unnecessary to decide the issue of whether timely notice was provided.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.

CONCLUSIONS

(1) Claimant has not satisfied his burden of proof to persuade the trier of fact by a preponderance of the credible evidence that it is more probably true than not true that he sustained personal injury by accident, or by a series of repetitive accidents, arising out of and in the course of his employment with respondent.

(2) Conclusion (1) above is the same regardless of whether the provisions of the New Act or the Old Act apply to this claim. It is therefore unnecessary to decide which Act applies, the date of accident, and whether timely notice was provided to respondent.

(3) The preliminary order awarding medical treatment to claimant must accordingly be reversed.

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge dated November 14, 2011, is reversed.

IT IS SO ORDERED.

Dated this _____ day of January, 2012.

c:

[10] K.S.A. 44-534a.

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MANUEL J. DOMINGUEZ-RODRIGUEZ Claimant	)	
VS.	)	Docket No. 1,058,613
AMARR GARAGE DOORS Respondent	)	
AND	)	
TRAVELERS INDEMNITY COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the February 7, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) , appeared for claimant. , appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 31, 2012, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant asserts he met with personal injury by accident on November 7, 2011, arising out of and in the course of his employment. At the preliminary hearing, claimant requested medical treatment and temporary total disability benefits. Respondent denies claimant met with personal injury by accident and that claimant's injury arose out of and in the course of his employment. Respondent alleges that if claimant suffered a personal injury, it occurred at his home during the weekend before November 7, 2011. In the alternative, respondent asserts that if claimant suffered an accident at work on November 7, 2011, that accident was not the prevailing factor that caused claimant's medical condition and disability.

Respondent further asserts claimant is not entitled to temporary total disability benefits (TTD). Respondent alleges that claimant is not temporarily totally disabled because respondent could have accommodated his work restrictions had he not been terminated for cause due to excessive absenteeism. Respondent argues in the alternative that if claimant is entitled to TTD, claimant's TTD should not extend beyond November 18, 2011.

The ALJ found claimant met with personal injury by accident on November 7, 2011, arising out of and in the course of his employment with respondent and that claimant's accident was the prevailing factor causing claimant's injury. He also determined that claimant was not terminated for just cause. The ALJ ordered medical treatment with Dr. Bernhardt and TTD paid at the rate of $293.34 per week commencing November 17, 2011, until further order or until claimant has been returned to substantial and gainful employment or released at maximum medical improvement. Respondent appeals but in its Application for Review and brief to the Board it did not address the issue of whether the Board had jurisdiction to review the preliminary Order of the ALJ. Claimant asks the Board to affirm the ALJ's preliminary Order, and in his brief did not address the issue of jurisdiction. Therefore, the issues are:

1. Did claimant sustain a personal injury by accident on November 7, 2011, arising out of and in the course of his employment with respondent.

2. If so, was claimant's accident on November 7, 2011, the prevailing factor causing his injury?

3. Does the Board have jurisdiction to review the issue of whether the ALJ erred by ordering TTD?

4. If so, is claimant entitled to TTD?

5. If claimant is entitled to TTD, should those benefits extend beyond November 18, 2011?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant helps build garage doors and arrives at work each day at 6:30 a.m. He starts the day by pushing an empty cart approximately 200 to 300 feet to get garage door panels. The wheel on the cart he was using did not operate properly, so he had to both push and pull it in order to control it. He testified that a cart full of garage door panels ranges from 100 to 200 pounds, and it takes claimant 15 to 20 minutes to complete a round trip to get materials. At his workstation, claimant's primary job duty was to attach

end styles, which weigh less than a pound, to garage door panels. The process requires claimant to use a cordless drill to attach the end styles to the panels with two screws. Once the panels are used up, he makes another trip to get more panels. After making two trips over a period of 45 minutes, claimant's left lower back began to stiffen. Claimant testified he started feeling pain when he was pushing and pulling the cart. When he returned to his work position, he bent over to pick up a style and could not straighten up.

A fellow employee advised claimant to report the injury to a supervisor and claimant told his supervisor, Joy Reed, what happened. Claimant can speak and understand English, but his primary language is Spanish. An interpreter was utilized at the preliminary hearing for claimant's testimony. Claimant indicated he spoke to Ms. Reed in English. Claimant told Ms. Reed he injured his back while lifting and could not lift doors anymore.

Ms. Reed testified that on November 7, 2011, claimant did indeed complain of back pain every time he bent over. However, when asked if he hurt himself at work, claimant indicated the injury occurred during the previous weekend. Ms. Reed acknowledged that she has a hard time understanding claimant when he gets excited. However, she testified, "in the end I know what he's telling me."[1] On November 7, 2011, Ms. Reed sent an e-mail to Teresa Fowler, safety administrator for respondent, which indicated claimant complained of back pain, but that claimant said it was not work related.[2] Her e-mail did not indicate claimant injured himself during the weekend.

Claimant testified that he did not tell Ms. Reed his injury occurred the weekend before November 7, 2011, and does not know why she would say this. According to claimant, when he reported the injury to Ms. Reed, she told him two times, "you know that this didn't happen here."[3] He then said okay and Ms. Reed told him to go to his own doctor. Claimant then went home.

Claimant's wife was at work on November 7, 2011, when she received a telephone call from claimant a little before 9:00 a.m. Claimant was in pain and requested that she come home, which she immediately did. Claimant's wife had to assist him to their automobile and transported him to Stormont-Vail Health Care (Stormont-Vail). On the way to Stormont-Vail, claimant said he was injured at work, but his supervisor, Joy Reed, said it could not happen at work. Claimant's wife testified that before claimant went to work on November 7, 2011, his back was normal.

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[1] P.H. Trans. at 28.

[2] *Id.*, Resp. Ex. A.

[3] *Id.*, at 41.

The records from Stormont-Vail emergency room indicate claimant reported that he stood up at work and had a sudden onset of lumbar pain. No x-rays, MRIs or other diagnostic tests were conducted. Claimant was released to go home that same afternoon.

On November 9, 2011, claimant saw Dr. Michael Geist, who assessed claimant with low back pain and spasm. He prescribed medication for claimant and indicated claimant could not return to work. Claimant saw Dr. Geist again on November 10, 2011. Dr. Geist indicated claimant could return to work if there was "strict light duty available."[4] Specifically he restricted claimant from lifting more than five pounds, no bending, squatting or twisting and sitting less than two hours in an eight-hour workday.

At the request of his attorney, claimant was seen on January 10, 2012, by Dr. Edward J. Prostic, an orthopedic specialist. Dr. Prostic's report indicates claimant was injured at work. Claimant related how he had been moving carts and lifting equipment when he felt a worsening of pain from his back to his left leg. Dr. Prostic took x-rays which revealed significant disc space narrowing at L5-S1. He stated:

> On or about November 7, 2011, Manual *[sic]* J. Dominguez-Rodriquez *[sic]* sustained injury to his low back during the course of his employment. He has an unspecified injury to his low back, most likely with contained disc protrusion. Conservative care should be offered with intermittent heat or ice and massage, therapeutic exercises, medicines, and physical therapy. Presently, the patient may return to light/medium-level employment with lifting 35 pounds occasionally knee-to-shoulder. The work-related accident of November 7, 2011 is the prevailing factor in the injury and need for treatment.[5]

Claimant testified that he was kept off work by Dr. Geist until Monday, November 14, 2011. Claimant had previously gotten permission from Ms. Reed to see a dentist on November 14, 2011. Ms. Reed testified that she told claimant if he went to the appointment, his job was in jeopardy, but that despite her warning, claimant went to the appointment. Claimant testified that he would not have gone to the dentist if he was told by Ms. Reed that he would be fired if he went. Claimant was terminated by respondent on November 16, 2011, for excessive absenteeism.

The ALJ's findings are set out above. In his preliminary Order, the ALJ stated, "To deny benefits based upon absences due to workers compensation injuries is contrary to the intent of the Act."[6] He went on to say that "it would be tautologically unjust to construe

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[4] *Id.*, Cl. Ex. 2.

[5] *Id.*, Cl. Ex. 1 at 2.

[6] ALJ Order (Feb. 7, 2012) at 3.

the Workers Compensation Act to deny temporary total benefits to a worker based upon his absences from work due to a workers compensation injury."[7]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) provides:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in relevant parts:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> . . . .
>
> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

[7] *Id.*

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-534a(a)(2) provides the Board may review only the following issues determined by an ALJ in his or her preliminary Order:

A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2011 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 2011 Supp. 44-510c provides in relevant parts:

(b)(2)(A) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary restrictions for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, provided that if there is an authorized treating

> physician, such physician's opinion regarding the employee's work status shall be presumed to be determinative.
>
> . . . .
>
> (C) If the employee has been terminated for cause or voluntarily resigns following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

ANALYSIS

Claimant testified that he told his wife and Ms. Reed, his supervisor, that he was injured at work. The records from Stormont-Vail and Drs. Geist and Prostic indicate claimant injured his back on November 7, 2011, while performing his job duties for respondent. Ms. Reed testified that claimant reported that he injured his back over the weekend. The ALJ found claimant's wife was a "truthful, credible witness and an articulate historian."[10] This Board Member concurs.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,[11] appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[12]

Here, the ALJ had the opportunity to assess the testimony of claimant, his wife and Ms. Reed. The Board generally gives some deference to an ALJ's findings and

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[8] K.S.A. 44-534a.

[9] K.S.A. 2011 Supp. 44-555c(k).

[10] ALJ Order (Feb. 7, 2012) at 2.

[11] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[12] *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant presented sufficient evidence to prove he suffered a personal injury by accident on November 7, 2011, arising out of and in the course of his employment. This Board Member concurs with the ALJ's findings on this issue.

The only medical provider that addressed the issue of whether claimant's accident on November 7, 2011, was the prevailing factor in causing his injury was Dr. Prostic. His opinion was that claimant's accident was indeed the prevailing factor causing claimant's injury and his need for treatment. This opinion was not controverted by another physician. Accordingly, this Board Member finds that claimant's accident was the prevailing factor causing claimant's injury and his need for treatment.

The Board's jurisdiction to review preliminary Orders is set out in K.S.A. 2011 Supp. 44-534a(a)(2) and K.S.A. 2011 Supp. 44-551(i)(2)(A). The language of K.S.A. 2011 Supp. 44-534a(a)(2) does not grant the Board jurisdiction to review whether the ALJ erred by granting claimant TTD. Therefore, the Board only has jurisdiction to review the preliminary Order granting TTD if the ALJ exceeded his authority. In its brief, respondent did not assert the ALJ exceeded his jurisdiction by ordering TTD. The ALJ did not exceed his jurisdiction by rejecting respondent's argument that claimant was terminated for cause and ordering respondent to pay claimant TTD commencing November 17, 2011, until further order or until claimant has been returned to substantial and gainful employment or released at maximum medical improvement. The Board does not have jurisdiction to review whether the ALJ erred in granting claimant TTD.

CONCLUSION

1. Claimant met his burden of proof that he sustained a personal injury by accident on November 7, 2011, arising out of and in the course of his employment with respondent.

2. Claimant's accident on November 7, 2011, was the prevailing factor causing his injury.

3. The Board does not have jurisdiction to review the issue of whether the ALJ erred by ordering TTD. Accordingly, the issues raised in respondent's brief concerning TTD are dismissed.

WHEREFORE, the undersigned Board Member affirms the February 7, 2012, preliminary hearing Order entered by ALJ

IT IS SO ORDERED.

Dated this ____ day of April, 2012.

BOARD MEMBER

c:

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROGER G. YARBRO Claimant	)	
VS.	)	
FIRST AMERICA Respondent	)	Docket No. **1,056,623**
AND	)	
NEW HAMPSHIRE INSURANCE Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the September 21, 2011 preliminary hearing Order for Medical Treatment entered by Administrative Law Judge

ISSUES

The Administrative Law Judge (ALJ) found claimant's accidental injury arose out of and in the course of employment with respondent and the accidental injury was the prevailing factor causing his injuries. The ALJ ordered claimant's medical treatment with Dr. Michael Smith to be paid by respondent.

Respondent requests review of whether claimant sustained a personal injury arising out of and in the course of his employment with respondent and whether claimant's accident was the prevailing factor in causing his medical condition and any resulting impairment or disability.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Roger Yarbro began working as a bus driver for respondent in August 2001. His routes were the morning, midday and afternoon which was about 7.5 hours per day, 5 days a week. Claimant would also get overtime hours if he drove for activity trips in addition to his normal work day schedule. He was paid $12.35 an hour or approximately $500 a week.

On Monday, May 16, 2011, claimant was driving a bus and had stopped at a stop light. The bus was rear ended by a drunk driver's vehicle that was going approximately 50 miles an hour. The impact knocked the bus forward 12 feet. The bus' frame was bent and it was taken out of service. Claimant testified:

> At the point of impact it was just like a big light went off, you know, boom. And when I tried to get out, I could not stand up. I had no balance, you know.
>
> Q. What part of your body did you feel symptoms in immediately, if any?
>
> A. Immediately in my lower back and my neck.[1]

Claimant initially refused medical treatment and later drove the bus back to the lot even though the bus was totaled. But as his back and neck pain did not improve, on Friday, May 20, 2011, respondent's manager or safety manager told claimant to seek medical treatment at Lawrence Memorial Hospital's emergency room. Claimant was having severe neck pain, tingling with numbness in his left arm and also a headache. X-rays were taken of claimant's back and also a CT scan of his neck. Both tests did not show any abnormality. The doctor prescribed some medication for pain and referred claimant to Dr. Chris Fevurly.

On Monday, May 23, 2011, claimant was examined and evaluated by Dr. Fevurly. Sixteen sessions of physical therapy were ordered for claimant's back and neck. But the physical therapy did provide any benefit. On June 21, 2011, Dr. Fevurly noted claimant had not made any progress in five weeks of conservative treatment. Dr. Fevurly recommended an MRI and epidural injections for claimant's cervical and lumbar spine but the recommended treatment was not approved by respondent.

Claimant then retained counsel and filed this claim, whereupon respondent referred claimant to see Dr. Michael Smith on July 29, 2011. Claimant complained of lower back pain radiating into the left buttocks and left posterior thigh. Claimant also complained of neck pain with numbness and weakness in the left arm. Dr. Smith recommended an MRI of claimant's cervical, thoracic and lumbar spine. In Dr. Smith's notes he opined that the motor vehicle accident was the prevailing factor in claimant's current complaints. The report provided in pertinent part:

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[1] P.H. Trans. at 10.

> I am in receipt of a letter from Jean Hoffmann. Mr. Yarbro is asking whether I think the motor vehicle accident is the prevailing factor in his current complaint. At this juncture, I think that it is. Without any further studies, it's hard to know exactly what's going on, but his complaints seems to have begun after the motor vehicle accident.[2]

On August 11, 2001, an MRI of the cervical spine showed "evidence of a mild grade 1 reverse spondylolisthesis of C5 and C6 with diffuse degenerative changes and associated bulging of the disk complexes with central spinal canal and neural foraminal narrowing noted at multiple levels . . . These findings are most pronounced at the C5-6 level where there is severe central spinal canal narrowing and apparent compression of the cord with prominence of the central spinal canal noted as described."[3]

Claimant returned to see Dr. Smith on August 19, 2011, for a follow-up to discuss his MRI results. X-rays of claimant's cervical spine were taken. The radiographs showed a fair amount of degeneration in the cervical spine at C4-5 and C5-6. The doctor diagnosed claimant with fairly significant cervical stenosis at C5-6 and recommended that claimant undergo a cervical decompression and fusion at C4-5, C5-6 and C6-7.

Claimant discussed the surgical option with Dr. Smith and asked what would happen if he declined the recommended surgery. Claimant testified that Dr. Smith told him that if he did not have the surgery he could end up paralyzed.[4]

At the time of the preliminary hearing, claimant was still having back and neck pain as well as headaches. Claimant testified that he had not seen a doctor nor had any symptoms regarding his neck before the accident on May 16, 2011. Claimant is performing light-duty work and only working 4 hours a day for respondent.

The ALJ analyzed the evidence in the following pertinent fashion:

> Claimant's accident was the prevailing factor causing the injury. Claimant was involved in a serious motor vehicle accident caused by a drunk driver while driving a bus owned by his employer. There was no evidence of prior recommendation for surgery. Dr. Smith opined the risk of paralysis without surgery. There was no indication of a risk of paralysis prior to claimant's accidental injury. Claimant is 70 years old with no evidence of a pre-existing condition requiring medical care.

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[2] P. H. Trans., Cl. Ex. 2.

[3] P.H. Trans., Cl. Ex. 2.

[4] P.H. Trans. at 20.

The 2011 legislative session resulted in amendments to the workers compensation act. L. 2011, Ch. 55, Sec. 5 provides in relevant parts:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
>
> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> (2)(B) An injury by accident shall be deemed to arise out of employment only if: (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include: (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living; (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character; (iii) accident or injury which arose out of a risk personal to the worker; or (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Respondent argues claimant failed to meet his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment or that the accident caused his medical condition. Respondent argues that the accident merely rendered claimant's preexisting condition symptomatic. Respondent's argument that claimant had a preexisting condition is based upon the diagnostic tests which revealed claimant had degenerative disc disease.

The difficulty with respondent's argument is the fact that the only medical opinion offered in this case indicates that the accident was the prevailing factor with the claimant's current complaints. And although the medical records and diagnostic tests indicated that, not surprisingly, this 70-year-old claimant had degenerative disc disease, again, the sole medical opinion provided by Dr. Smith indicates that there was a potential for paralysis without surgery.

As noted by the ALJ, claimant had no history of cervical complaints before the accident. After the accident the evidence indicates claimant now has impingement causing numbness and weakness in his arm. That is a change in his physical structure causing harm. Upon consideration of all the relevant evidence submitted by the parties, this Board Member finds the claimant has met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment and the accident is the prevailing factor causing the injury, medical condition and disability. Consequently, the ALJ's Order for Medical Treatment is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge dated September 21, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2011.

BOARD MEMBER

c:

[5] K.S.A. 44-534a.

[6] K.S.A. 2010 Supp. 44-555c(k).

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES L. RAGAN Claimant	)	
VS.	)	Docket No. 1,059,278
SHAWNEE COUNTY Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the April 5, 2012, preliminary hearing Order entered by Administrative Law Judge [illegible]. [illegible] appeared for claimant. [illegible] appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant suffered an accidental injury that arose out of and in the course of his employment. In a separate Order Referring Claimant for Independent Medical Evaluation, the ALJ ordered claimant to undergo an independent medical evaluation by Dr. Edward Prostic.[1] Dr. Prostic was asked to render an opinion regarding whether claimant's accidental injury was the prevailing factor in causing his need for medical treatment. The ALJ did not order payment of any temporary total disability benefits, nor did he order treatment for any of claimant's medical conditions.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 5, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant suffered an accidental injury that arose out of and in the course of his employment. Respondent further argues that claimant's alleged work accident of October 3, 2011, was not the prevailing factor in causing his injury, medical condition and disability. Respondent argues

[1] The Order Referring Claimant for Independent Medical Evaluation, filed April 5, 2012, was not appealed to the Board, and even if it had been appealed, the Board would not have jurisdiction.

that claimant's alleged accident of October 3, 2011, merely aggravated, accelerated or exacerbated claimant's preexisting condition.

Claimant argues his injuries arose out of and in the course of his employment with respondent and that his accident of October 3, 2011, was the prevailing factor in causing his injuries.

The issue for the Board's review is: Did claimant sustain an accidental injury that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant has been employed by respondent in the solid waste department for seven and a half years. On March 28, 2006, he sustained a work-related injury to his left wrist when he picked up a doghouse and threw it into the back of a trash truck. At that time, claimant was sent by respondent to Dr. Donald Mead. X-rays were taken at St. Francis Hospital, and Dr. Mead gave claimant a splint and referred him to Dr. Richard Polly. Claimant saw Dr. Polly on one occasion. Claimant said by the time he saw Dr. Polly, he was feeling a little better, although his wrist still popped. However, he was not able to pop the wrist for Dr. Polly. Dr. Polly told claimant he had a sprain and that it would heal and he would be fine. Claimant was given no treatment by Dr. Polly, and he was not given any restrictions. Dr. Polly's report of May 25, 2006, reveals that x-rays showed claimant had a slight widening of the scapholunate joint. Claimant had clicking in both wrists, with the right wrist worse than the left. Dr. Polly diagnosed claimant with a sprained left wrist but said he did not believe his condition needed surgery.

Claimant returned to work for respondent. Claimant did not miss any time from work, and his left wrist continued to get better. He did not file an Application for Hearing in reference to the March 2006 injury.

In 2011, claimant began to have some twinges in his wrist. Then, on October 3, 2011, he was driving the trash truck, making a sharp turn in a cul de sac. While doing so, he heard and felt a pop and his left wrist "hurt like crazy a few minutes."[2] Claimant said the steering wheel in the trash truck is about two feet in diameter. Claimant said there was a catch in the steering on the truck he was driving. He said that every now and then, where the catch is, the steering will kick back. However, he said he was not sure that was what happened on October 3, 2011, as the incident happened so quickly.

Claimant reported his injury of October 3, 2011, to his supervisor, and respondent sent him again to Dr. Mead. X-rays were again taken of claimant's left wrist. Dr. Mead again gave claimant a splint, and then referred claimant to Dr. John Moore. Claimant said

[2] P.H. Trans. at 8.

Dr. Moore looked at his wrist and reviewed the x-rays taken both in 2006 and 2011, and told him he had a ruptured ligament and would need surgery. Claimant said he feels pain in his wrist, his range of motion has been decreased about 50 to 60 percent, and his grip has diminished.

Dr. Moore's records of his examination of claimant on October 21, 2011, shows claimant gave him a history of injuring his left wrist when turning a steering wheel and hearing a pop in his wrist. Claimant also told Dr. Moore about his injury in 2006. Dr. Moore reviewed the x-rays taken in 2006 and said they "showed a scapholunate disruption."[3] The current x-rays showed a "complete rupture left scapholunate with 3-4 mm space, developing radioscaphoid arthritis."[4] Dr. Moore recommended surgery to reconstruct claimant's scapholunate ligament. In a letter dated December 6, 2011, to claimant's case managers, Dr. Moore stated:

> The surgery suggested is needed due to the preexisting scapholunate ligament rupture, which was reinjured on 10/03/11. It is clear from his medical record and old x-rays that the scapholunate ligament was completely ruptured, however, back in 2006. The symptoms he is having now are a direct extension of that old rupture.
>
> I do not consider turning a steering wheel a traumatic event causing an injury, which is what happened on 10/03/11. That is simply when the last shreds of remaining support for his scaphoid gave way and made his wrist more symptomatic again.[5]

Claimant has not had any injuries to his left wrist other than the work-related injuries in March 2006 and October 2011.[6]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

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[3] P.H. Trans., Cl. Ex. 3 at 4.

[4] *Id.*

[5] P.H. Trans., Cl. Ex. 3 at 1.

[6] P.H. Trans. at 10-11.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an

> issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

Claimant had a left wrist injury in 2006 which was diagnosed at the time as a sprain. Dr. Polly reviewed the x-ray and examined claimant in 2006. He did not diagnose claimant with a rupture of the ligament. Claimant's symptoms resolved. On March 3, 2011, claimant suffered another injury to his left wrist. Dr. Moore believes that both claimant's 2006 injury and his 2011 injury involved a rupture of the scapholunate ligament. Although Dr. Moore refers to both accidents as a complete rupture, it is apparent that the 2006 accident was a partial rupture that became a complete rupture as a result of the 2011 accident. The October 3, 2011, accident "is simply when the last shreds of remaining support for his scaphoid gave way . . . ."[9]

The October 3, 2011, incident at work was "an undesigned, sudden and unexpected traumatic event." The definition of "accident" in K.S.A. 2011 Supp. 44-508 does not require there to be "a manifestation of force." The pop, followed by significant pain that claimant experienced while turning the dump truck wheel on October 3, 2011, was an accident as defined by statute. Furthermore, that accident not only caused claimant's current symptoms but also his current need for medical treatment because that event resulted in the complete rupture of his scapholunate ligament. The traumatic event is when the last shreds of remaining support for his scaphoid gave way. Claimant sustained a change in the physical structure of his wrist. Before October 3, 2011, claimant had some supporting structure, now he has none. Claimant had been released from treatment and was able to perform his regular job duties after the 2006 accident until the accident of October 3, 2011. The accident of October 3, 2011, was, therefore, the prevailing factor in causing claimant's current injury.

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[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2011 Supp. 44-555c(k).

[9] P.H. Trans., Cl. Ex. 3 at 1.

CONCLUSION

Claimant sustained personal injury by accident on October 3, 2011, that arose out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge dated April 5, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

BOARD MEMBER

c:

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KANIKA HOMAN Claimant	)	
VS.	)	Docket No. **1,058,385**
U.S.D. #259 Self-Insured Respondent	)	

ORDER

Self-insured respondent requests review of the March 8, 2012, preliminary hearing Order entered by Administrative Law Judge . appeared for claimant. appeared for the respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript with exhibits taken March 8, 2012, and all pleadings contained in the administrative file.

ISSUES

Claimant was unloading a wheelchair bound student from the bus when a wheel came off the wheelchair. As claimant held the wheelchair up so the student wouldn't fall, claimant injured her left wrist. Respondent agreed the incident happened but argues that the accident only aggravated claimant's preexisting carpal tunnel syndrome and pursuant to K.S.A. 2011 Supp. 44-508(f)(2) such an injury is not compensable.

The Administrative Law Judge (ALJ) found claimant's accident on August 26, 2011, compensable as the incident was the prevailing factor for her left wrist condition and need for medical treatment.

Respondent requests review of whether claimant met with personal injury by accident arising out of and in the course of her employment. Respondent argues that claimant's workplace injury aggravated her preexisting carpal tunnel syndrome and pursuant to K.S.A. 2011 Supp. 44-508(f)(2) an injury that solely aggravates a preexisting condition is not compensable.

Claimant argues that she suffered a specific traumatic injury which was the prevailing factor in her condition and need for medical treatment. Therefore, the ALJ's Order should be affirmed.

The sole issue raised on appeal is whether claimant suffered a compensable personal injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant, employed as a para-educator with respondent since August 2009, had an incident with a student in a wheelchair on August 26, 2011. Claimant works with mentally challenged children.

Claimant described the incident:

> I was unloading the student from the bus, bringing her into the building, and her wheel came off of her wheelchair, and I was holding her up so she wouldn't fall to the ground while the other two paras were trying to unstrap her from her chair, because she was secure, feet was secure, chest harness was secure, and seat belt was secure.[1]

The left big wheel on the wheelchair fell off and as a result of holding the student up claimant twisted her left wrist. Claimant experienced an immediate onset of pain in her left wrist.

Claimant was referred that day for treatment with Dr. Mark Melhorn. The doctor diagnosed claimant with a painful left hand and wrist. Dr. Melhorn then treated claimant with a series of injections into her left wrist. In the office notes from claimant's September 27, 2011 office visit with Dr. Melhorn it was noted that claimant probably had preexisting carpal tunnel syndrome and the injury possibly might have accentuated the process.

At the request of claimant's attorney, Dr. Pedro A. Murati examined claimant on December 15, 2011. Dr. Murati diagnosed claimant with an aggravation of her left carpal tunnel syndrome and a left torn triangular fibrocartilage. Dr. Murati further opined the conditions were the direct result of the August 26, 2011 accident. And the accident at work was the prevailing factor in the development of her conditions.

K.S.A. 2011 Supp. 44-508(d) defines accident:

> 'Accident' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of

[1] P.H. Trans. at 6-7.

> occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. 'Accident' shall in no case be construed to include repetitive trauma in any form.

The claimant's incident at work on August 26, 2011, clearly was a sudden and unexpected traumatic event. The incident meets the definition of an accident which occurred during claimant's work shift. Consequently, claimant suffered a work-related accident on August 26, 2011. And Dr. Murati opined the accident was the prevailing factor in causing claimant's injuries.

Before the recent statutory amendments there would be no dispute claimant suffered accidental injury arising out of and in the course of her employment. But there is now an additional element regarding whether the injury is compensable even in a case where it is not disputed claimant suffered an accident at work. K.S.A. 2011 Supp. 44-508(f)(2) provides:

> An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

Again there is no serious dispute claimant suffered an accident at work which arose out of and in the course of her employment. But even such an obvious work-related accident is not compensable if it solely renders an asymptomatic preexisting condition symptomatic.

In this case there is evidence that claimant had been diagnosed with preexisting carpal tunnel syndrome in her left wrist. Claimant testified that she not only was unaware of that diagnosis but also her left wrist was asymptomatic until the August 26, 2011 work-related accidental injury. In 2008 claimant had suffered a fall in her shower and injured her right elbow. In the course of treatment for that injury a nerve conduction study to both upper extremities was read as positive for bilateral carpal tunnel syndrome. Claimant testified that after that injury she only received treatment for her right elbow and she was never told about the bilateral carpal tunnel syndrome. And claimant testified that her left wrist was asymptomatic. In 2008 claimant also saw Dr. Melhorn one time as a result of her right elbow injury and in his records he noted the nerve conduction study indicated bilateral carpal tunnel syndrome. But claimant received no treatment from Dr. Melhorn.

Turning to the medical evidence in this case it should be noted that Dr. Melhorn, the treating physician, diagnosed claimant with a painful left hand and wrist. Dr. Melhorn never diagnosed left carpal tunnel syndrome nor was his treatment for that condition. When notified by respondent that the left carpal tunnel syndrome was preexisting the doctor noted it was "possible" the injury "might" have accentuated claimant's probable preexisting left carpal tunnel syndrome. Dr. Murati noted the injury aggravated the preexisting carpal

tunnel syndrome and also caused a left torn triangular fibrocartilage. And Dr. Murati provided an undisputed opinion that the accident was the prevailing factor in the need for medical treatment for both conditions.

Simply stated, Dr. Melhorn did not diagnose left carpal tunnel syndrome. The doctor provided treatment for claimant's diagnosed painful left hand and wrist injury. And Dr. Melhorn did not opine that it was probable that the injury had accentuated claimant's underlying carpal tunnel syndrome. Moreover, Dr. Murati did not opine that the injury "solely" aggravated claimant's preexisting carpal tunnel syndrome. Instead he opined that the injury had not only aggravated the preexisting carpal tunnel syndrome but had also resulted in a left torn triangular fibrocartilage. Based upon the evidence compiled to date, this Board Member finds that K.S.A. 2011 Supp. 44-508(f)(2) is not applicable. Claimant has met her burden of proof to establish she suffered accidental injury arising out of and in the course of her employment and such accident was the prevailing factor in causing her injuries.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[2] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[3]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge dated March 8, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

_____

BOARD MEMBER

e:

[2] K.S.A. 44-534a.

[3] K.S.A. 2011 Supp. 44-555c(k).

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD L. FISHER Claimant	)	
VS.	)	Docket No. 1,057,789
OLATHE FORD SALES, INC. Respondent	)	
AND	)	
KANSAS AUTOMOBILE DEALERS WORK COMP FUND Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the December 29, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) . appeared for claimant. appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 28, 2011, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant alleges he injured his neck on August 27, 2011, when he lifted a pickup truck door while working in respondent's body shop. At the preliminary hearing, he requested medical treatment and temporary total disability (TTD) benefits. Respondent asserted that claimant's injury did not arise out of and in the course of his employment because of the enactment of L. 2011, Ch. 55, Sec. 5 which amended K.S.A. 2010 Supp. 44-508. Respondent argues subsection (f)(2) of L. 2011, Ch. 55, Sec. 5 provides that an injury is not compensable because work was a triggering or precipitating factor; nor is an

injury compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

Claimant had a previous neck injury and in 2005 underwent a discectomy and fusion at the C5-C6 and C6-C7 levels. A plate and screws were placed in claimant's cervical spine during surgery. The ALJ found claimant's current injury did not arise out of and in the course of his employment and, therefore, denied claimant's request for medical treatment and TTD benefits. Therefore, the issue is:

Did claimant sustain a personal injury by accident arising out of and in the course of his employment with respondent when applying the provisions of L. 2011, Ch. 55, Sec. 5?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

On March 2, 2005, claimant underwent a cervical discectomy and fusion at C5-C6 and C6-C7. As part of the surgery, a plate and screws were inserted into claimant's neck. For approximately a year after that surgery claimant had neck problems, including pain, swelling and headaches. In 2007, claimant returned to motor vehicle body work. He began working for respondent on March 1, 2009. Claimant testified that when he worked for respondent, he would lift parts weighing from 5 pounds up to 200 pounds. His job duties required him to work in awkward positions, stand, and turn and twist his body. Claimant indicated he had no problems completing his job duties or with his neck until the accident.

On August 27, 2011, claimant was working as a collision technician for respondent. He carried the door of a Ford F-150 pickup truck, which weighed 70-80 pounds, from the main shop to the body shop. While halfway to his destination, claimant felt something in his neck. His neck swelled up and "[t]he muscles and everything just knotted up and it was pretty intense."[1] Claimant testified the swelling was so severe that he found it nearly impossible to swallow and the pain extended into the middle of his back.

Claimant immediately reported the incident, and he was asked by respondent if he wanted to see a physician. Claimant decided to try and work the rest of the day, but the pain continued to get worse. Claimant testified the next day he was sent to Concentra by respondent where he eventually saw Dr. Harold Hess, a neurosurgeon.

[1] P.H. Trans. at 7.

Claimant saw Nurse Practitioner Genevieve K. Adams at Concentra on August 31, 2011. Her report from that visit indicates claimant completed a comprehensive questionnaire, which was not made part of the evidence. Based on that questionnaire, Ms. Adams determined claimant had a prior cervical disc surgery in 2005 with fusion at C5-C7. A plate and screws were inserted into claimant's neck. Cervical spine x-rays were taken, which revealed a questionable fracture of a screw at C5. A CT scan of the neck was also ordered. Ms. Adams' assessments of claimant on August 31, 2011, were cervical radiculopathy, cervical strain, and probable damage to cervical hardware.

Concentra's records indicate claimant saw Dr. Harold Hess on September 8, 2011. Claimant did not bring his x-rays and CT scans, but Dr. Hess did read the x-ray and CT reports. Dr. Hess' impression was "[p]robable cervical strain. It is extremely unlikely that his lifting injury at work 6 years after his original surgery would cause a fracture of the screw. This screw fracture is probably old."[2] Dr. Hess ordered a myelogram and another CT scan. Claimant requested to return to work and Dr. Hess allowed him to do so without restrictions.

Claimant testified that he tried to return to work on September 19, 2011, and he used a drill, causing his neck to swell. On the same day he went to Concentra, where he saw Ms. Adams.

Following the myelogram and second CT scan, claimant saw Dr. Hess on September 29, 2011. His impression after this visit was that claimant had a nonunion of C5-C6, which caused the fracture of the C5 screw. He indicated the fracture of the screw was related to claimant's 2005 surgery and not related to claimant's current injury. Dr. Hess' recommendation was that claimant see a physiatrist who would manage a course of rehabilitation. Dr. Hess indicated claimant insisted on seeing another neurosurgeon and that claimant was going to contact workers compensation to make such a request.

A Concentra record with no date of service shown indicated Dr. Hess diagnosed claimant with a cervical strain, cervicalgia, and neuralgia, neuritis and radiculitis, unspecified. Significant temporary restrictions were listed with a return-to-work date of September 29, 2011. The Concentra record noted claimant was referred to a physiatrist. It also stated the likely date claimant would reach maximum medical improvement would be January 26, 2012.

Claimant was seen at the request of his counsel by Dr. James A. Stuckmeyer, an orthopedic surgeon, on October 24, 2011. Dr. Stuckmeyer reviewed the records of Ms. Adams and Dr. Hess and reviewed the x-rays, CT scans and myelogram results, and

[2] *Id.*, Cl. Ex. 2.

not merely the reports.[3] Claimant informed Dr. Stuckmeyer that prior to the August 27, 2011, accident he had symptoms of mild neck pain, but was able to maintain gainful employment that required a heavy lifting capacity. Dr. Stuckmeyer concurred with Dr. Hess that pseudoarthrosis existed at C5-C6 prior to the 2011 accident.

Dr. Stuckmeyer made the following comments in his report dated November 5, 2011:

> It would be the opinion of this examiner that it is speculative to state whether or not the screw fractured on the right at the C5 level is a result of the accident. This indeed represents a possibility. More concerning, from this examiner's point of view with expertise and background in spinal instrumentation and fusion, is that as a direct, proximate, and prevailing factor of the accident, when Mr. Fisher was picking up the truck doors, he disrupted this pseudoarthrosis at the C5-C6 level when he heard or felt the large pop in his neck with the development of radicular symptoms in the left upper extremity. . . .[4]
>
> . . . .
>
> While the pseudoarthrosis, in this examiner's opinion, predated the accident date in discussion, it would be the opinion of this examiner that the accident of August 27, 2011, more likely than not disrupted this preexisting pseudoarthrosis, and the aforementioned treatment recommendations are indicated to cure and relieve Mr. Fisher of the symptoms which developed as a result of this work-related injury.[5]

On Friday, December 2, 2011, claimant worked for 40 minutes and sat around the rest of the day due to lack of work. The next day he hurt so badly he went to the emergency room at Phelps County Regional Medical Center (Phelps) in Rolla, Missouri. Cervical spine x-rays taken at claimant's December 3, 2011, emergency room visit revealed a broken screw. The records from Phelps provide little assistance on the issues of causation and whether claimant's injury arose out of and in the course of his employment with respondent.

Claimant was treated for his neck by neurosurgeon Dr. Paul O'Boynick. His complete medical records do not appear to be made part of the record as the record only contains return-to-work slips dated November 14 and December 12, 2011, and a report dated December 12, 2011. It appears claimant saw Physician Assistant Mark Pemberton with Dr. O'Boynick's office on December 12, 2011. The December 3, 2011, x-rays were

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[3] *Id.*, Cl. Ex. 5 at 2.

[4] *Id.*, Cl. Ex. 5 at 5.

[5] *Id.*, Cl. Ex. 5 at 6.

reviewed showing the fractured C5 screw. The report indicated claimant did not need surgery and that claimant would be kept off work until January 26, 2012.

The ALJ determined claimant's injury did not arise out of and in the course of his employment with respondent and stated in his Order:

> There were conflicting medical opinions as to whether this injury was caused by the work incident or the prior fusion procedure. The injury in this case was a disrupted pseudoarthrosis causing a broken screw in cervical fusion hardware. This kind of injury would only occur from lifting a car door where the worker had a prior cervical fusion. This type of injury therefore arose out of a risk personal to the claimant, and the prior fusion was the prevailing factor in causing this particular injury. For these reasons it is held the injury did not arise out of and in the course of employment and the claimant's requests for medical treatment and temporary total benefits are denied.[6]

PRINCIPLES OF LAW

The 2011 legislative session resulted in amendments to the Workers Compensation Act. L. 2011, Ch. 55, Sec. 1 provides in relevant part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, Ch. 55, Sec. 5 provides in relevant parts:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
>
> . . . .
>
> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

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[6] ALJ Order (Dec. 29, 2011) at 2.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

In their briefs, claimant and respondent cited the recent Board decision of *Yarbro*.[7] There, one of the issues was whether Yarbro's accident was the prevailing factor causing his injury. Yarbro, aged 70, was in a serious work-related motor vehicle accident that caused a cervical spine injury. Following the accident, Yarbro had an MRI which showed preexisting cervical problems. Before the accident, Yarbro did not have any cervical symptoms and had never obtained medical treatment for his cervical spine. The ALJ found and the Board Member affirmed that Yarbro's accident was the prevailing factor causing his injury.

[7] *Yarbro v. First America*, No. 1,056,623, 2011 WL 6122928 (Kan. WCAB Nov. 22, 2011).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

ANALYSIS

There is no dispute that in 2005, claimant had his cervical spine fused at C5-C6 and C6-C7 and had a plate and screws inserted. Dr. Hess diagnosed claimant with a cervical strain and a fractured screw at C5. He also indicated claimant had a nonunion of C5-C6. He specifically indicated that the nonunion of C5-C6 caused the screw to break and this was not related to the accident on August 27, 2011.

Dr. Stuckmeyer indicated that the accident of August 27, 2011, "disrupted" claimant's preexisting pseudoarthrosis (a fibrous union) at the C5-C6 level. He indicated it would be speculation to say the screw was broken as a result of claimant's accident on August 27, 2011. The December 12, 2011, report by Mr. Pemberton with Dr. O'Boynick's office indicated claimant had a fractured screw at C5, but the limited report does not state whether the fractured screw was or was not the result of lifting the door.

Respondent is correct that in 2011, the Kansas Legislature placed new parameters on the definition of what constitutes a personal injury arising out of and in the course of employment. The fracture of the screw is a structural change and, therefore, constitutes a personal injury. However, claimant presented insufficient evidence to show the screw fractured as a result of claimant lifting the door. No physician opined that it was more probably true than not that the screw broke as a result of the accident. Claimant's own expert, Dr. Stuckmeyer, said it would be speculative to make such an assumption.

L. 2011, Ch. 55, Sec. 5 provides that an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. If a fact finder were to adopt Dr. Stuckmeyer's analysis that claimant had preexisting pseudoarthrosis, which was "disrupted" by the accident, claimant's injury would not be compensable. It is unknown what Dr. Stuckmeyer meant when he used the term "disrupted." Disrupted may or may not be synonymous with aggravated and/or exacerbated. This Board Member finds that claimant's fractured screw and any disruption of claimant's preexisting pseudoarthrosis are not compensable injuries as they did not arise out of or in the course of his employment with respondent.

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[8] K.S.A. 44-534a.

[9] K.S.A. 2010 Supp. 44-555c(k).

The ALJ did not address whether claimant's cervical strain arose out of and in the course of his employment. Dr. Hess diagnosed claimant with a cervical strain and Ms. Adams assessed the same. While Dr. Hess indicated it was unlikely that lifting the door caused the fractured screw, no such statement was made about claimant's cervical strain. No medical evidence was presented indicating the pain and swelling experienced by claimant was due solely to the disruption of the preexisting pseudoarthrosis and fractured screw.

Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[10] Claimant was lifting a door between 70-80 pounds and felt immediate pain. His neck swelled and the pain extended into his upper back. On at least two occasions he returned to work for a short period of time. He then experienced swelling and pain in his neck and sought medical treatment and did not return to work. This Board Member finds claimant proved by a preponderance of the evidence that he sustained a cervical strain injury by accident arising out of and in the course of his employment with respondent and that the accident was the prevailing factor that caused claimant's cervical strain.

CONCLUSION

1. Claimant's fractured screw at C5 did not arise out of and in the course of his employment with respondent.

2. The disruption of claimant's preexisting pseudoarthrosis did not arise out of and in the course of his employment with respondent.

3. Claimant sustained a cervical strain injury by accident arising out of and in the course of his employment with respondent.

WHEREFORE, the undersigned Board Member affirms, in part, the December 29, 2011, preliminary hearing Order entered by ALJ by finding that claimant's fractured screw at C5 and the disruption of claimant's preexisting pseudoarthrosis did not arise out of and in the course of his employment with respondent. However, this Board Member reverses, in part, the December 29, 2011, preliminary hearing Order entered by ALJ Hursh by finding that claimant sustained a cervical strain injury by accident arising out of and in the course of his employment with respondent. This matter is remanded to the ALJ to issue further orders consistent with these findings.

IT IS SO ORDERED.

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[10] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

Dated this ____ day of February, 2012.

BOARD MEMBER

c:

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT M. MACINTOSH Claimant	)	
VS.	)	
GOODYEAR TIRE & RUBBER CO. Respondent	)	Docket No. **1,057,563**
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

Claimant requests review of the November 4, 2011 Preliminary Hearing Order entered by Administrative Law Judge

ISSUES

The Administrative Law Judge (ALJ) found that claimant failed to sustain his burden of proof that his low back injury arose out of and in the course of employment because his incident at work was not the prevailing factor causing the injury. The ALJ determined that the claimant's need for medical treatment was caused by an aggravation and exacerbation of a preexisting condition in his lumbar spine.

Claimant requests review of whether he sustained a compensable injury and whether the accident is the prevailing factor causing the injury, medical condition and resulting disability. Claimant argues he suffered a new and distinct injury on June 17, 2011, which is a direct consequence of the accident at work. Claimant further argues that the accident is the prevailing factor causing the injury, medical condition and resulting disability.

Respondent argues claimant failed to prove that his June 17, 2011, alleged work-related injury was the prevailing factor in causing claimant's injury, medical condition and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant began working for respondent in May 2008. A pre-employment physical was required. Claimant initially worked in the distribution warehouse and then later moved to the warehouse's shipping and receiving end. His job required claimant to move tires from the final finish area to the stocking locations. Then in March 2011 claimant was transferred to the assembly department. Claimant was required to lift and carry 20-80 pound tire components inside the tire room. But on June 17, 2011, claimant was working overtime performing his old job in the warehouse.

Because of the recent statutory amendments to the workers compensation act it is necessary to address claimant's history of low back complaints. It is undisputed that claimant had episodic treatment for low back complaints before the June 17, 2011 incident at work. The medical records introduced at the preliminary hearing indicate that in approximately August 2006 claimant sought treatment for back pain and was diagnosed with trochanteric bursitis of the left hip. Claimant received an injection into his left hip and recovered immediately after the injection.

The next episode of treatment for back complaints occurred in June 2007 through August 2007 when claimant described back pain with radicular pain down into the left hip. Claimant testified that after conservative treatment including physical therapy he had a near full recovery.

Claimant next sought medical treatment for his back in December 2008 when claimant experienced back pain after lifting his daughter. Again the pain improved until he caught the flu and vomited aggressively which increased his back pain. This episode appears to be the only instance claimant complained of pain down his right leg. And from December 15, 2008, until the incident at work on June 17, 2011, claimant did not have any incidents of back pain with symptoms going down his right leg. Again claimant indicated he had a near full recovery after this episode.

On May 18, 2009, claimant took a commercial driver's license physical and did not have any back problems at that time. In November 2009, claimant had some back pain with symptoms in his left leg which waxed and waned. Dr. Hutchins ordered an MRI which occurred on November 20, 2009. The MRI revealed at L3-4, a mild posterior broad-based disk bulge and a suspected small annular tear within the disk bulge. At L4-5, a left paracentral mild protrusion measuring 4 mm in AP dimensions and bilateral lateral recess stenosis secondary to mild broad-based disk bulge. At L5-S1, there is a mild posterior disk bulge without central canal stenosis or neural foramina stenosis. Dr. Hutchins then referred claimant to see Dr. Louis Pau in January 2010. Dr. Pau prescribed pain patches and also recommended a TENS unit. Claimant tried to use the pain patches at work but

he testified that the pain patches didn't stay adhered to his skin in order to relieve his pain. Again, claimant had a near full recovery from this incident.

The claimant then returned to Dr. Hutchins complaining of left lower back pain in October 2010 and received a trigger point injection in his left lower back. Claimant did not have any permanent limitations or restrictions regarding his low back and did not receive any treatment for his back during the intervening 8 months until after the incident at work on June 17, 2011.

On June 17, 2011, claimant was using a forklift to take tires from stocking locations and load them into a trailer. The trailer is connected to the dock using a hydraulic adjusting lift plate that adjusts the dock height to the trailer's floor height. It is similar to a ramp. Claimant would drive the forklift over the ramp from the dock to the trailer in order to move the tires. Between the dock height and the trailer's floor height could be anywhere from 8 to 10 inches difference. Claimant described the ride and transition:

> Both enter and exiting, you will have two different jolt points. One is the beginning of the dock plate. As you are entering in, you have that deviation when you go from flat to the beginning of the ramp or the dock plate. And then you have where the flap goes up that will make the difference between the trailer floor and the dock plate. You will have a jolt at that point, too. So, there's -- so, there's two -- two points where you feel the jolt.[1]

The jolt caused claimant to bounce up and down as well as twist to the side. Claimant was not having any problems with his lower back before the accident. But as the forklift bounced claimant felt immediate pain from his lower back going down to his right ankle.

The pain complaints from his low back down to his right ankle continued throughout the weekend. So on Monday, claimant advised his supervisor, Janeice Brown, about the accident which had occurred on June 17, 2011. Claimant asked to see his own doctor, Joel Hutchins. On June 20, 2011, claimant saw Dr. Hutchins and received a steroid injection. The doctor took him off work. On June 22, 2011, claimant received an epidural but he still continued to have back pain as well as pain radiating down his right leg. Respondent was not able to provide accommodations for claimant's restrictions of no lifting over 5-10 pounds.

On a July 27, 2011 visit at Concentra the report indicates claimant indicated that he did not think his injury was related to his current job but was filing a claim because he thought he had to.[2] But claimant did not recall ever saying that.

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[1] P.H. Trans. at 10.

[2] *Id.*, Resp., Ex. B.

Dr. Hutchins provided claimant additional conservative care and then referred claimant for an MRI and to a neurosurgeon, Dr. Matthew Wills. On August 10, 2011, an MRI was again performed on claimant's lumbar spine. The MRI revealed some dessication and mild bulging of the L3-4 disk, at L4-5 there was mild to moderate posterior osteophytic formation with bulging of the disk and at L5-S1 there was moderate bulging of the disk with protrusion of disk material to the right of the midline encroaching upon the ventral subarachnoid space extending caudally along the right side indenting and displacing the thecal sac in the right passing nerve root.

Claimant was examined and evaluated by Dr. Wills on August 22, 2011. Dr. Wills ordered more physical therapy and indicated that claimant was not a candidate for surgery. Claimant returned to see Dr. Hutchins from August 30th through October 25, 2011. Since October 20, 2011, claimant has either been off work or on restrictions. Dr. Hutchins ordered another epidural which claimant received on November 1, 2011.

At the time of the preliminary hearing, claimant was still having pain from the lower back to the right ankle and stiffness in the right buttock and hamstring. Also, claimant has lost feeling in the groin, genitalia and bowel areas.

Claimant testified:

> Q. I want you to tell the Judge what's different as far as what you're experiencing since June 17th as compared to what you experienced before June 17th.
>
> A. The majority that I can recall of everything I had before has always been on the left side -- lower left side. I've never had it be as extreme as what I've had now going down the right side. I've never felt the nerve go down all the way to the ankle like I have or -- or whenever I've had any nerve feeling it was on the left side and only dropped down to the hip where this is the right side and has gone all the way down to the ankle. I have never had any numbness due to any of this pain like I have be-- I've never had numbness like this current issue here. I've never had any -- how do I say this politely? Any erectile disfunction [sic] prior to the nerve and numbness. I've never had any urination/bowel movement problems prior to --
>
> Q. Are you having those problems now?
>
> A. Yes.
>
> Q. Okay, go ahead.
>
> A. And I've never had any of my prior back trouble take me out of work. I've always been able to work through it before where this is just something that I have not been able to work through.[3]

[3] P.H. Trans. at 24-25.

Claimant testified that the back and left side pain he experienced before the accident at work would occur for a week or two and then it would go away for months at a time.

At the request of claimant's attorney, on October 11, 2011, claimant was examined and evaluated by Dr. William Hopkins. Dr. Hopkins was provided a history of claimant driving the forklift and receiving jarring to the low back due to the irregularity in the heights between the dock and trailer. Dr. Hopkins specifically noted the results from the MRI performed in November 2009 and the MRI performed August 10, 2011. The doctor opined the MRI performed in 2011 indicated significant changes at L5-S1 which were caused by the incident at work on June 17, 2011. In the report of his examination Dr. Hopkins noted in pertinent part:

> Based on the information I have available to me, I believe that the repetitive injuries that Mr. MacIntosh sustained on or about June 17, 2011, are the direct and prevailing factors causing Mr. MacIntosh's injury to his L5-S1 disk and it is also the direct and prevailing factor causing the need for his medical treatment.
>
> In addition, the accident is the prevailing factor causing his current impairment and the cause of his work restrictions that have been outlined by Dr. Hutchins.[4]

The 2011 legislative session resulted in amendments to the workers compensation act. L. 2011, Ch. 55, Sec. 5 provides in relevant parts:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
>
> . . .
>
> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

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[4] P.H. Trans., Petitioner's Ex. 2.

. . .

> (2)(B) An injury by accident shall be deemed to arise out of employment only if: (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> . . .
>
> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Initially, the facts establish that claimant suffered an unexpected traumatic event when there were significant jolts when he drove the forklift over the ramp into the trailer on June 17, 2011. Caimant experienced an immediate onset of low back pain that extended down his right side into his right ankle. The MRI performed on August 10, 2011, revealed a herniated disk at L5-S1 encroaching upon the ventral subarachnoid space extending caudally along the right side indenting and displacing the thecal sac in the right passing nerve root. The evidence clearly establishes claimant suffered a work-related accident.

But the amended statutes now require that the accident must be the prevailing factor causing the injury, medical condition and resulting disability or impairment and an accidental injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

The ALJ determined that because of claimant's preexisting low back condition the incident merely rendered his preexisting condition symptomatic. This Board Member disagrees.

It is clear that claimant had sought episodic treatment for low back pain before the work-related incident on June 17, 2011. Such treatment was primarily focused on pain that extended down into his left side and left lower extremity. A comparison of the MRI's performed before and after June 17, 2011, both revealed findings at L3-4, L4-5 and L5-S1. But after the June 17, 2011 accident claimant's pain complaints were on the right and extended down into the right lower extremity to the ankle. And this was corroborated by a new finding on MRI of a herniated disk at L5-S1 which impinged on the nerve. Thus, the accident did not solely aggravate a preexisting condition as claimant did not have a herniated disk at L5-S1 before the June 17, 2011 incident at work.

Turning to the requirement that the accident must be the prevailing factor causing the injury, medical condition and resulting disability, the uncontradicted medical evidence was provided by Dr. Hopkins. And Dr. Hopkins stated the injuries claimant suffered on

June 17, 2011, were the direct and prevailing factors not only causing injury to his L5-S1 disk but were also the direct and prevailing factor causing his need for medical treatment, work restrictions and his current impairment. This Board Member finds claimant has met his burden of proof to establish that he suffered a work-related accidental injury on June 17, 2011, and that such accidental injury is the prevailing factor causing the injury, medical condition and resulting disability.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge dated November 4, 2011, is reversed and remanded for determination of the remaining issues.

IT IS SO ORDERED.

Dated this 31st day of January, 2012.

BOARD MEMBER

c:

[5] K.S.A. 44-534a.

[6] K.S.A. 2010 Supp. 44-555c(k).

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CRAIG R. TINDELL Claimant	)	
VS.	)	Docket No. 1,059,684
ASSOCIATED WHOLESALE GROCERS INC. Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the April 4, 2012, preliminary hearing Order entered by Administrative Law Judge appeared for claimant. appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant failed to prove by a preponderance of the evidence that his left shoulder condition arose out of and in the course of his employment with respondent, either by traumatic injury or by repetitive trauma. Accordingly, claimant's request for workers compensation benefits was denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 4, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant asks the Board to reverse the Order of the ALJ and find that claimant's left shoulder injury was compensable under the Kansas Workers Compensation Act.

Respondent asserts that claimant failed to prove he suffered a personal injury either as a result of a single traumatic accident on February 1, 2012, or from repetitive trauma. Respondent asks that the ALJ's Order be affirmed, arguing that claimant failed to meet any of the prongs of the traumatic injury test found in K.S.A. 2011 Supp. 44-508(f).

The issue for the Board's review is: Did claimant sustain personal injury either by an accident or repetitive trauma that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

On February 17, 2012, claimant filed his Application for Hearing in which he claimed a series of accidents caused by "repetitive heavy work moving product culminating while loading a trailer on 2/1/12 and tried to pry a box loose using his left arm & injured his left shoulder."[1]

Claimant was 58 years old at the time of the preliminary hearing, and he began working for respondent on April 22, 1981. As of February 1, 2012, claimant was working as a driver loader. His job entailed lifting items that weighed anywhere from 1 to 2 pounds up to 85 to 90 pounds. Claimant shrink-wrapped product to keep it from falling off the pallet, which required him to work and lift above shoulder height while pulling the wrap tightly. Claimant also described his job as fast-paced, stating that respondent had production standards that needed to be met. Claimant stated that in his 31 years of working for respondent, he did not have a chargeable on-the-job injury until his current injury. However, he experienced aches and pains while performing his repetitive, fast-paced, strenuous job duties.

On February 1, 2012, claimant was loading a pallet onto a trailer when one of the cases on top of the pallet got wedged in between the top of the trailer door and the door seal. Claimant got off his forklift and reached up with his left hand to try to pry the cases out. In doing so, he felt a sharp pain in his left shoulder and heard a pop. The wedged case came lose, and claimant returned to his forklift and finished loading the trailer. He was able to continue operating the forklift, which he normally steers with his left hand. Claimant testified that although his shoulder was tender, he was able to finish out his shift.

When claimant went home he took a shower and went to bed. He did not treat his shoulder in any way. Three or four hours after he fell asleep, he was awakened by the pain he felt in his left shoulder. He took some Ibuprofen and went back to bed, but when he got up his left shoulder was still bothering him, so he reported the injury to respondent. Respondent sent claimant to Concentra the day he reported the injury, February 2, 2012, and claimant described his accident to the medical providers. He was sent to have an MRI on February 6, 2012, which showed a full thickness large rotator cuff tear. Claimant was told by a doctor at Concentra that he was diagnosed with complete rupture of his rotator cuff, subscapularis tear, glenohumeral arthrosis, fraying infraspinatus, subchondral cyst,

[1] Form K-WC E-1, Application for Hearing filed February 17, 2012. The form used by claimant does not contain the new language for repetitive traumas. Instead, it asks claimant to "[s]tate specifically the exact cause and source of accident/disease:."

and shoulder pain. He was told by the doctor that although he had significant left shoulder problems, they were not related to his employment. Concentra then referred claimant to an orthopedic surgeon, Dr. Erich Lingenfelter.

Claimant saw Dr. Lingenfelter on March 16, 2012. He gave Dr. Lingenfelter a history of his injury. Dr. Lingenfelter's medical history indicates that claimant "continued to work all day and then apparently there was some concern that he helped move his mother and there is an ongoing investigation as to whether there was something done outside of work that has caused this."[2] Claimant testified that helping his mother move was nothing more than taking her around to help her decide where she wanted to move. His mother did not move until February 24, 2012, and claimant did not help with the actual moving.

Dr. Lingenfelter reviewed the MRI and agreed it showed a full thickness large rotator cuff tear. However, he also stated the MRI showed that claimant had grade II fatty degeneration present in the tear, significant glenohumeral arthritis with marked thinning of the articular cartilage, as well as labral degeneration consistent with chronicity. Dr. Lingenfelter opined:

> When someone has grade II fatty degeneration, it clearly confirms for a fact, without any question, that there is a chronicity to the tear. You do not get grade II fatty degeneration and infiltration and a two tendon tear four days after an injury. Therefore, without a doubt something has been going on before. When I question him about this, he said that his shoulder had hurt in the past and he wen [*sic*] on to say that he has done a lot of repetitive lifting out of the plane of the body loading and repetitive motion with his shoulder and he also attributes this to his shoulder pain in the past. If we are asked that did this specific incident cause this finding, for a fact this is indisputable that it did not.[3]

Claimant was seen by Dr. William Hopkins on February 14, 2012, at the request of claimant's attorney. Dr. Hopkins reviewed the MRI report of February 6, 2012, which he noted showed a full thickness rotator cuff tear of the supraspinatus tendon. Dr. Hopkins said claimant also had some tendinopathy involving the infraspinatus and some partial thickness tears of the infraspinatus with an associated tear of the subscapularis tendon. In addition, claimant had a dislocation of the biceps glenohumeral joint as well as diffuse labral degeneration, including a superior anterior labral tear. Claimant had type I acromion with moderate osteoarthrosis of the acromioclavicular joint. Dr. Hopkins said claimant had some superior migration of the humeral head, as was to be expected with a full thickness supraspinatus tear with retraction.

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[2] PH Trans., Resp. Ex. A at 1.

[3] *Id.* at 2.

Dr. Hopkins opined that claimant's long-term work duties in his 31-year history with respondent, culminating with the specific injury of February 1, 2012, are the prevailing factors causing claimant's temporary inability to work at gainful employment. Dr. Hopkins stated that although at claimant's age he would have some degree of degenerative changes, "[t]o disregard his injury as a culminating event causing the tear of his supraspinatus tendon with its massive retraction in association with dislocation of the biceps tendon, in my opinion, is a misrepresentation of the facts."[4] Dr. Hopkins believed claimant should be evaluated by a shoulder surgeon and surgery performed as soon as possible.

Claimant denied having any problems with his left shoulder prior to the February 1, 2012, incident, other than the normal pain he had working, which he felt in his shoulders, knees and legs. He had seen no doctor concerning his left shoulder before the accident.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
>
> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

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[4] PH Trans., Cl. Ex. 1 at 4.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[6]

ANALYSIS

Initially, there is the question of whether claimant's injury was caused by a single accident or by repetitive trauma. Dr. Lingenfelter was asked specifically whether the incident on February 1, 2012, caused claimant's findings on MRI. Dr. Lingenfelter opined that claimant's two torn tendons and other findings did not occur in a single event on February 1, 2012. Instead, it was his opinion that the tears were something that had been going on for some time. But claimant is not alleging that his left shoulder problems are all a result of the single trauma at work on February 1, 2012. Rather, claimant has alleged a series of repetitive work-related traumas each and every day worked and continuing through February 1, 2012. This is consistent with Dr. Lingenfelter's opinion "that repetitive loading and lifting out of the plane of the body can cause attritional overload which can lead to this . . . ."[7]

Additional support for the work activities over time causing claimant's current condition comes from Dr. Hopkins. "His [claimant's] 31 years of heavy repetitive work duties culminating with the specific injury on 2/1/2012 are the prevailing factor causing his current medical condition and his current need for treatment with regard to his left shoulder."[8] Respondent points to the portion of Dr. Hopkins' report which reads: "At his [claimant's] age of 58 certainly some degree of degenerative changes is going to occur under the normal course of events. At least half of the male population beyond the age of 50 has similar changes."[9] However, Dr. Hopkins was not referring to all of the findings disclosed by the MRI. In addition to the torn tendons, claimant had other degenerative type conditions. Dr. Hopkins noted:

> An MRI report of Mr. Tindell's left shoulder was reviewed. This study was ordered by Dr. Wakwaya. The report was from an MRI which was performed on

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[5] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[6] K.S.A. 2011 Supp. 44-555c(k).

[7] PH Trans., Resp. Ex. A at 2.

[8] PH Trans., Cl. Ex. 1 at 4.

[9] *Id.*

> February 6, 2012. A multiplicity of serious abnormalities were noted. He had a complete full thickness rotator cuff tear of the supraspinatus tendon involving the tendon primarily at the level of the insertion with a 24 mm tendon retraction. He did have some tendinopathy involving the infraspinatus and had some partial thickness tears of the infraspinatus with an associated tear of the subscapularis tendon. In addition, he had a dislocation of the biceps tendon anteriorly with underlying tendinopathy. He had moderate arthrosis of the glenohumeral joint was described as well as diffuse labral degeneration including a superior anterior labral tear. He had a type I acromion with moderate osteoarthrosis of the acromioclavicular joint.[10]

Dr. Lingenfelter likewise noted the multiplicity of serious abnormalities revealed by the MRI.

> IMAGING: MRI, which I have reviewed and is of a reasonable quality, shows a full thickness large rotator cuff tear with about 2.5 cm of retraction. He has grade II fatty degeneration already present in this. This MRI was dated four to five days after his reported work injury. He has significant glenohumeral arthritis with marked thinning of the articular cartilage, as well as labral degeneration consistent with chronicity and essentially osteoarthritis and chondromalacia of the glenohumeral joint. He has multiple subchondral cystic changes in the lateral humeral head and acromioclavicular joint arthrosis as well. He also has a tear of the subscapularis tendon that also has fatty degeneration as well with a dislocated biceps tendon which we as shoulder surgeons term a pulley lesion. There is also cephalad migration of the humerus on the MRI which is not an uncommon finding with rotator cuffs in general. On the plain x-rays the acromiohumeral distance is maintained. He has some degenerative changes present in the glenohumeral joint as well as the acromioclavicular joint.[11]

What it appears Dr. Hopkins was alluding to when he said "[a]t least half of the male population beyond the age of 50 has similar changes"[12] are the degenerative changes that were in addition to the torn tendons, not the tendon tears themselves. Certainly over 50 percent of males over 50 do not have full thickness tears of their subscapularis and supraspinatus tendons with massive retraction.

This Board Member finds that claimant has met his burden of proving he met with injury to his left shoulder by repetitive work-related traumas and that those traumas are the prevailing factor in causing his injury and need for treatment. Claimant's work activities exposed him to a greater risk of injury than he was exposed to in his normal non-employment life.

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[10] PH Trans., Cl. Ex. 1 at 3.

[11] PH Trans., Resp. Ex. A at 1.

[12] PH Trans., Cl. Ex. 1 at 4.

CONCLUSION

Claimant sustained personal injury by repetitive trauma arising out of and in the course of his employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge April 4, 2012, is reversed and remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

BOARD MEMBER

c:

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAVITA BRANDON Claimant	)	
VS.	)	Docket No. 1,058,735
FARMERS INSURANCE GROUP Respondent	)	
AND	)	
LIBERTY MUTUAL INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the February 8, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ)
, appeared for claimant.
appeared for respondent and its insurance carrier (respondent).

The record on appeal consists of the transcript of the February 7, 2012, preliminary hearing and Claimant's Exhibit 1 thereto; the transcript of the February 6, 2012, deposition of Dr. Brian J. Divelbiss and exhibits thereto; and all pleadings contained in the administrative file. When received by the Board, Claimant's Exhibit 1 to the preliminary hearing transcript contained only the medical report of Dr. James A. Stuckmeyer, medical records of Dr. Suzanne G. Elton and a document entitled "Musculoskeletal Disorders (MSDs)." Claimant's Exhibit 1 to the preliminary hearing transcript did not include the records of Drs. Michael E. Ryan and John E. Oxler, Jr., nor records from OHS. On March 23, 2012, the parties stipulated that Claimant's Exhibit 1 to the preliminary hearing

transcript would include the MSD document, Dr. Stuckmeyer's report, the records of Drs. Elton, Ryan and Oxler, and the OHS records.[1]

ISSUES

Claimant alleged that "[o]n or about September 8, 2008 through November 18, 2011",[2] she sustained the following injuries: "[b]ilateral carpal tunnel syndrome, left and right upper extremities, body as a whole."[3] Claimant asserted the cause of her injuries was answering 50 to 60 telephone calls a day and repetitively keyboarding information into the computer for each call. Claimant requested that the ALJ appoint Dr. Elton as claimant's authorized treating physician.

Respondent asserted that claimant's work activity of keyboarding was not the prevailing factor that caused claimant's carpal tunnel syndrome. Respondent then argued claimant's carpal tunnel syndrome did not arise out of and in the course of her employment. Respondent also objected to the ALJ's admission of Dr. Stuckmeyer's report and the MSD document.

The ALJ authorized Dr. Suzanne G. Elton to perform surgery on claimant, implying claimant met her burden of proving she sustained a personal injury by repetitive trauma arising out of and in the course of her employment with respondent. ALJ Howard also denied respondent's objections to Claimant's Exhibit 1 to the preliminary hearing transcript.

The issues before the Board on this appeal are:

1. Did the ALJ err by admitting the medical report of Dr. Stuckmeyer and the Musculoskeletal Disorders document as part of Claimant's Exhibit 1 to the preliminary hearing transcript?

2. Did claimant sustain carpal tunnel syndrome by repetitive trauma arising out of and in the course of her employment with respondent? Specifically, were claimant's work activities the cause of her injuries?

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[1] It appears the ALJ considered only the medical report of Dr. Stuckmeyer, the MSD document and the medical records of Dr. Elton as Claimant's Exhibit 1 to the preliminary hearing transcript. The Board will consider all of the reports, records and documents that the parties stipulated were part of Claimant's Exhibit 1 to the preliminary hearing transcript. The Board is cognizant of the fact that at the preliminary hearing respondent objected to the medical report of Dr. Stuckmeyer and the MSD document.

[2] Application for Hearing (filed Dec. 7, 2011).

[3] *Id.*

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

At the preliminary hearing, claimant testified she was 49 years of age and had worked for respondent for three years. Claimant was a Senior Service Advocate, which required her to receive incoming calls, perform constant keyboarding, frequently use a computer mouse and sometimes call agents. She estimated receiving 50 to 60 calls a day and would sometimes have five or six screens up on her computer monitor at one time. In 2010, respondent installed a new system that required claimant to answer more calls and do more cutting and pasting on the computer.

In 2011, claimant began experiencing wrist pain and sought treatment on November 9, 2011, from her family physician, Dr. John E. Oxler, Jr. Claimant testified, and Dr. Oxler's records indicated, the onset of wrist pain was gradual. Dr. Oxler ordered nerve conduction/EMG studies (EMG) on both wrists, which were conducted by Dr. Michael E. Ryan on November 18, 2011. Dr. Ryan's conclusions were that the EMG revealed moderate right median entrapment neuropathy at the level of the wrist and mild to moderate left median entrapment neuropathy at the level of the wrist. He also indicated that claimant's symptoms suggested tendinitis, but palpation at the base of her thumb up along the radial aspect where de Quervain's would occur did not elicit pain or discomfort and there was no swelling in that area or calor.

Claimant was sent to OHS-Compcare, where she saw Dr. William H. Tiemann on November 30, 2011. Claimant reported to Dr. Tiemann that a couple of months earlier she started having sharp pains to both of her wrists. Claimant brought Dr. Tiemann the EMG studies and Dr. Ryan's interpretation of those studies. Dr. Tiemann diagnosed claimant with bilateral carpal tunnel syndrome. He had claimant fitted for wrist braces, told claimant to take Tylenol/Ibuprofen, and to ice the affected areas. Dr. Tiemann allowed claimant to return to full work duty. He also requested approval from respondent to refer claimant to a hand specialist.

On December 9, 2011, claimant saw Dr. Suzanne G. Elton, an orthopedic surgeon. Claimant reported numbness and tingling in all her fingers, including her thumbs, with the right wrist worse than the left. Dr. Elton's records indicate claimant's injuries occurred on November 30, 2011, when claimant began to experience sharp pains at work. Dr. Elton reviewed the records of Dr. Ryan and the EMG studies he conducted. She assessed claimant with bilateral carpal tunnel syndrome and discussed several treatment options with claimant, including splints, injections and surgery. Dr. Elton was the first physician who gave claimant work restrictions. She gave claimant temporary restrictions of left-handed work only, decreasing her priority for receiving telephone calls and using splints at night only. Ultimately, Dr. Elton recommended surgery, consisting of endoscopic carpal

tunnel release. However, claimant reported for surgery on the day it was scheduled, only to learn it was cancelled by respondent.

At the request of her attorney, claimant was seen on January 19, 2012, by Dr. James A. Stuckmeyer, an orthopedic surgeon. He reviewed the medical records of Drs. Elton, Oxler and Ryan. Dr. Stuckmeyer also obtained detailed information concerning claimant's job duties. Claimant reported that she was still working at restricted duty and had increased symptoms of bilateral tingling and numbness, bilateral wrist pain with nocturnal awakening, decreased grip strength and difficulty with fine motor skills. His conclusion was:

> I feel within reasonable medical certainty that as a direct, proximate, and prevailing factor of repetitive keyboarding performed by Ms. Brandon while employed with Farmers Insurance that she has developed symptoms of bilateral carpal tunnel syndrome, right greater than left. I would concur with Dr. Elton that bilateral carpal tunnel releases are warranted, and feel within in *[sic]* a reasonable degree of medical certainty that the necessity for the surgical procedure is a direct, proximate, and prevailing factor of the repetitive keyboarding performed while employed at Farmers Insurance.[4]

In his report, Dr. Stuckmeyer explained how he believes repetitive work activities can cause carpal tunnel syndrome:

> Tendon inflammation resulting from repetitive work, such as uninterrupted typing, will cause carpal tunnel symptoms. Performing repetitive wrist and finger flexion causes inflammation of the flexor tendons due to friction within the compressed carpal tunnel; leading to damage of the underlying tendons, blood vessels and median nerve. . . .[5]

On January 26, 2012, claimant was evaluated at respondent's request by orthopedic specialist Dr. Brian J. Divelbiss. The report of Dr. Divelbiss indicated claimant worked in a call center and spent most of her day on a computer. His impression was that claimant had bilateral carpal tunnel syndrome, right worse than left. Dr. Divelbiss opined that while claimant's "work activities may certainly be an aggravating factor in the presentation of her carpal tunnel syndrome, there is no evidence that keyboard activities would be considered the prevailing cause in the presentation or continuation of carpal tunnel syndrome."[6] Dr. Divelbiss indicated "[a]ggravating is a factor which may take an underlying condition

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[4] P.H. Trans., Cl. Ex.1.

[5] *Id.*

[6] Divelbiss Depo., Ex. 2 at 2.

and make it more symptomatic."[7] Dr. Divelbiss testified that keyboarding can never be the cause of carpal tunnel syndrome; consequently, keyboarding cannot be the prevailing factor causing claimant's injuries. He testified the most significant factors in the development of claimant's bilateral carpal tunnel syndrome were her gender, age and obesity. He acknowledged that whatever the cause of claimant's bilateral carpal tunnel syndrome, she needed surgery.

Dr. Divelbiss ascribes to a medical philosophy that the etiology of carpal tunnel syndrome is primarily structural, genetic and/or biological. He believes the vast majority of carpal tunnel syndrome conditions are idiopathic and that environmental and occupational factors, such as repetitive hand use, play a "more minor and more debatable impact."[8] Dr. Divelbiss testified this philosophy is generally accepted within the American Academy of Orthopedic Surgeons and is the majority view of most orthopedic hand specialists. However, he provided no basis for this belief. When asked what, if any, work activities are generally considered causative factors of carpal tunnel syndrome, Dr. Divelbiss testified that long-term exposure to vibratory tools such as driving, or any job requiring "strenuous and repeated wrist flexion and extension"[9] would be activities that are causative factors of carpal tunnel syndrome.

Dr. Divelbiss relied on a scientific article entitled, "The Quality and Strength of Evidence for Etiology: Example of Carpal Tunnel Syndrome" coauthored by Santiago Lozano-Calderon, MD; Shawn Anthony, BS; and David Ring, MD, PhD, which was published by the American Society for Surgery of the Hand in 2008.[10] The authors reviewed 117 articles and studies that dealt with the causation of carpal tunnel syndrome and concluded that current scientific evidence is inadequate to implicate environmental or occupational factors in carpal tunnel syndrome. Of the 117 publications reviewed by the authors, 45 evaluated the role of repetitive hand use in the etiology of carpal tunnel syndrome. Of the 45 publications, 66% found a correlation between repetitive hand use and carpal tunnel syndrome.[11] Despite this, the authors concluded occupational factors play a minor role in the etiology of carpal tunnel syndrome.

At the preliminary hearing, claimant's attorney introduced Claimant's Exhibit 1, which contained medical reports of Drs. Stuckmeyer and Elton and the MSD document. Claimant's brief stated the reports of Drs. Ryan and Oxler were part of Claimant's Exhibit 1.

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[7] *Id.*, at 24.

[8] *Id.*, at 11.

[9] *Id.*, at 12.

[10] *Id.*, Ex. 3.

[11] *Id.*

This Board Member then contacted the attorneys for respondent and claimant. They indicated the medical reports of Drs. Ryan and Oxler and the medical records from OHS were inadvertently left out of Claimant's Exhibit 1. The parties then entered into a stipulation that Claimant's Exhibit 1 should consist of the medical report of Dr. Stuckmeyer, the medical records of Drs. Elton, Ryan and Oxler, the OHS records and the MSD document.

At the preliminary hearing, respondent objected to Claimant's Exhibit 1 because it contained Dr. Stuckmeyer's report and the MSD document. Respondent's objection to Dr. Stuckmeyer's report was based upon the requirements of K.S.A. 2011 Supp. 44-534a and K.S.A. 2011 Supp. 44-551. Respondent asserts that Dr. Stuckmeyer's report was not included in claimant's application for preliminary hearing and was not provided within a reasonable time. Respondent took the deposition of Dr. Brian J. Divelbiss on February 6, 2012. Respondent asserts that claimant had the report of Dr. Stuckmeyer prior to Dr. Divelbiss' deposition, but did not provide a copy of Dr. Stuckmeyer's report to respondent until after the deposition of Dr. Divelbiss. Claimant responded that a copy of the report was provided to respondent on February 6, 2012, a few hours after claimant's attorney received it.

Respondent objected to the MSD document on the grounds that there was a lack of foundation. Specifically, respondent contended there was no indication of where the document came from or who authored it.

At the preliminary hearing, the ALJ stated he would take under advisement respondent's objection to Dr. Stuckmeyer's report and the MSD document. In his preliminary Order, the ALJ stated, "Respondent/Insurance Carrier's objection to Claimant's Exhibit 1 is denied. The report was given to Respondent the date it was received."[12] ALJ Howard's Order does not specifically mention any of the medical reports or documents contained in Claimant's Exhibit 1.

In his preliminary Order, ALJ Howard did not make a specific finding that claimant's carpal tunnel syndrome arose out of and in the course of her employment with respondent. The ALJ authorized Dr. Elton to perform surgery on claimant, which implies the ALJ concluded claimant's injuries arose out of and in the course of her employment with respondent.

PRINCIPLES OF LAW

The 2011 legislative session resulted in amendments to the Kansas Workers Compensation Act. K.S.A. 2011 Supp. 44-501b(c) provides:

[12] ALJ Order (February 8, 2012).

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in relevant parts:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . . .

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-534a(a)(2) states in pertinent part:

A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board.

K.S.A. 2011 Supp. 44-551(i)(2)(A) states in pertinent part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

ANALYSIS

In his Order, the ALJ denied respondent's objection to Claimant's Exhibit 1 to the preliminary hearing transcript. In the next sentence of his Order, the ALJ goes on to say the report was given to respondent the date it was received. This causes some confusion as it implies the ALJ considered only respondent's objection to Dr. Stuckmeyer's report. The language of the ALJ's preliminary Order does not specifically indicate whether the ALJ sustained or denied respondent's objection to the MSD document. However, this Board Member believes the ALJ's initial statement that he was denying respondent's objection to Claimant's Exhibit 1 applied to respondent's objection to Dr. Stuckmeyer's report **and** the MSD document.

This Board Member finds that neither K.S.A. 2011 Supp. 44-534a nor K.S.A. 2011 Supp. 44-551 give the Board jurisdiction to review the ALJ's ruling that Dr. Stuckmeyer's report and the MSD document were admissible. In *Gilchrist*,[15] a Board Member held that the ALJ did not exceed his authority by admitting a medical report. In *Dowell*,[16] a Board Member held that an ALJ's ruling that drug test results were inadmissible was an interlocutory ruling and thus not appealable.

Respondent asserts the cause of claimant's bilateral carpal tunnel syndrome is unknown. Respondent argues that while claimant's work activities may have aggravated her bilateral carpal tunnel syndrome, her work activities were not the prevailing factor causing claimant's bilateral carpal tunnel syndrome.

Drs. Stuckmeyer and Divelbiss examined claimant a week apart yet gave widely divergent opinions on whether claimant's work activities were the cause of her bilateral carpal tunnel syndrome. Dr. Stuckmeyer gave a detailed explanation of how repetitive work activities cause carpal tunnel syndrome. He opined that within reasonable medical

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[13] K.S.A. 2011 Supp. 44-534a.

[14] K.S.A. 2011 Supp. 44-555c(k).

[15] *Gilchrist v. Herrman's Excavating, Inc.*, No. 1,044,329, 2009 WL 4674079 (Kan. WCAB Nov. 30, 2009).

[16] *Dowell v. Copp Transportation*, No. 1,004,562, 2004 WL 1810316 (Kan. WCAB July 16, 2004).

certainty, as a direct, proximate, and prevailing factor of repetitive keyboarding performed, claimant developed symptoms of bilateral carpal tunnel syndrome.

Dr. Divelbiss is of the opinion that only a very few occupational activities can cause carpal tunnel syndrome and keyboarding is not one of those activities. Dr. Divelbiss testified that carpal tunnel can be caused by work activities that involve strenuous and repeated wrist flexion and extension. Keyboarding requires those very activities. He relies on a study that studied other articles and studies, which concluded the etiology of carpal tunnel syndrome is primarily structural, genetic and biological. Dr. Divelbiss testified, "[t]he vast majority of carpal tunnel is idiopathic, so we don't know what causes it."[17]

This Board Member finds the opinions of Dr. Stuckmeyer more credible than those of Dr. Divelbiss. Dr. Divelbiss' philosophy that keyboarding can never be the prevailing factor causing carpal tunnel syndrome and that most work-related activities only aggravate carpal tunnel syndrome is too rigid and is not supported by the medical research he purports to rely on for this opinion. In essence he believes repetitive work activities can only be the prevailing factor if they cause the underlying medical condition. He relies on a study made of other studies and scientific articles on the subject of carpal tunnel syndrome. At least some of those studies found there was a correlation between the development of carpal tunnel syndrome and repetitive hand use.

Keyboarding, such as that performed by claimant, nearly the entire workday, requires repeated hand movement and finger flexion. Claimant's testimony that her work activities caused numbness and tingling in her hands and wrist pain is convincing. This Board Member finds that claimant's work activities were the prevailing factor causing her carpal tunnel syndrome. Simply put, claimant has met her burden of proving that she suffered bilateral carpal tunnel syndrome as a result of repetitive trauma arising out of and in the course of her employment with respondent.

CONCLUSION

1. The Board is without jurisdiction to review the ALJ's finding admitting Dr. Stuckmeyer's report and the MSD document into evidence.

2. Claimant proved by a preponderance of the evidence that she sustained bilateral carpal tunnel syndrome by repetitive trauma arising out of and in the course of her employment.

WHEREFORE, the undersigned Board Member affirms the February 8, 2012, preliminary hearing Order entered by ALJ

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[17] Divelbiss Depo. at 29.

IT IS SO ORDERED.

Dated this ____ day of May, 2012.

BOARD MEMBER

c:

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL A. COATES Claimant	)	
VS.	)	Docket No. 1,057,719
STATE OF KANSAS Respondent	)	
AND	)	
STATE SELF-INSURANCE FUND Insurance Fund	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance fund appealed the January 17, 2012, Preliminary Hearing Order (Order) entered by Administrative Law Judge (ALJ) [redacted]s, appeared for claimant. [redacted] appeared for respondent and its insurance fund (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 17, 2012, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

On August 21, 2011, claimant was carrying two trash bags while descending a flight of three steps at work. Claimant was in a hurry as he was responsible for two juveniles who were cleaning floors and wanted to keep them in his sight. As claimant stepped on the second step, he rolled his ankle. The ALJ determined that claimant met with personal injury by accident arising out of and in the course of his employment with respondent. ALJ Sanders designated the first available physician at Kansas Orthopedics and Sports Medicine as claimant's authorized treating physician.

Respondent appeals and argues claimant's personal injury by accident did not arise out of and in the course of his employment as claimant's injury was the result of a "neutral risk." Under the Kansas Workers Compensation Act that was in effect prior to May 15, 2011 (Old Law), if claimant's injury was the result of a neutral risk, it would be compensable. However, K.S.A. 2010 Supp. 44-508 was amended by the Kansas Legislature, and after May 15, 2011, the Kansas Workers Compensation Act (New Law) specifically provides that the term "arising out of and in the course of employment" does not include injuries resulting from normal day-to-day activities, from a neutral risk or a risk personal to the worker.[1] Respondent argues that claimant had an unexplained fall and, therefore, was injured as the result of a neutral risk. At the preliminary hearing, respondent also alleged claimant's fall was the result of the activities of day-to-day living.

Respondent also asserts the ALJ exceeded her jurisdiction by ordering medical treatment for claimant. Claimant requests that the Order of the ALJ be affirmed in its entirety. Therefore, the issues are:

1. Did claimant sustain a right ankle injury by accident on August 21, 2011, arising out of and in the course of his employment with respondent?

2. Did the ALJ exceed her jurisdiction and/or authority by ordering medical treatment for claimant? Specifically, does the Board have jurisdiction to review this issue?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant works for Kansas Juvenile Corrections. At 8:00 p.m. on August 21, 2011, claimant was supervising two juveniles. Claimant is to keep the juveniles in his sight at all times. If he cannot, he is to "lock down" the juveniles. The two juveniles, who were serious offenders, had gathered trash from a day hall (also referred to as a unit by claimant) at the facility. Claimant testified, "I was gathering trash out of the office area which is a controlled room in between two units, so I have to go in there to get the trash and bring it back out so that it's ready to be taken out."[2] After the juveniles and claimant placed the trash into bags, claimant would take the bags down some stairs, out a door and into a sally port. While claimant is out the door and in the sally port, the juveniles are out of his vision for a brief period of time.

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[1] K.S.A. 2011 Supp. 44-508(f)(3)(A).

[2] P.H. Trans. at 6.

Claimant testified that he is usually in a hurry when he takes the bags of trash to the sally port. He wants to limit the time the juveniles are out of his sight. In fact, when claimant uses the restroom, he "locks down" the juveniles. Claimant indicated that when he takes the trash out at home, he takes it out in a different manner than he does at work. When he takes the trash out at home, claimant takes his trash out the back of his home, down one step. However, at home claimant is not in as big of a hurry to take the trash out as he is at work.

At the time he descended the stairs, claimant was carrying two trash bags, a 55-gallon trash bag and a kitchen-type trash bag, in front of him. He carried two bags in order to return to the unit more quickly. The two juveniles remained in the day hall and were sweeping and mopping the floor. When descending the stairs, as he was stepping onto the second step, claimant rolled his right ankle. Claimant fell and landed on his shoulder and body. He testified the steps were clean and not wet. He immediately felt intense pain, rolled over and called for help. Claimant was assisted by several other employees, including his supervisor, Sergeant Thompson. Claimant was sent by respondent to the emergency room at St. Francis Health Center (St. Francis). The medical report from that visit was not made part of the record.

Claimant returned to St. Francis on August 26, 2011. The impression of the attending physician, Dr. Donald T. Mead, was that claimant had a right ankle sprain and claimant could return to his normal duties. Dr. Mead gave claimant no restrictions. Dr. Mead's report indicates that since the accident, claimant started using the treadmill and had gone golfing. Claimant testified that Dr. Mead said it would be good to walk on a treadmill. He also testified that he did not actually play golf, but only practiced his putting and chipping.

At the request of his attorney, claimant was seen on September 19, 2011, by Dr. Daniel D. Zimmerman, who specializes in internal medicine. He examined claimant and had claimant's right foot and ankle x-rayed. The AP view of the right ankle demonstrated what Dr. Zimmerman thought might be a hairline fracture in the distal fibula. He opined that claimant had not yet reached maximum medical improvement. Dr. Zimmerman stated in his report:

> Mr. Coates may require an MRI of the right foot and ankle. He would benefit with physical therapy management and/or orthopedic management depending on the results of the MRI of the right foot and ankle. If he has a subtle fibular fracture, he may require casting and/or other orthopedic interventions.
>
> If there is no fracture of the distal fibula, physical therapy management and perhaps injections with steroid and local anesthetics may be warranted.[3]

[3] *Id.*, Cl. Ex. 1 at 4.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(c) provides:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508 provides in relevant parts:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

K.S.A. 2011 Supp. 44-534a provides:

(a)(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

ANALYSIS

This Board Member finds that claimant sustained a right ankle injury by accident that arose out of and in the course of his employment with respondent. Claimant's job duties included cleaning an office, supervising juveniles while they clean the unit and taking bags of trash from the unit, out a door and into a sally port. While performing these job duties, claimant is required to keep the juveniles within his vision at all times.

Respondent argues that the task of taking the bags of trash out is a normal day-to-day activity and, therefore, does not meet the definition of arising out of and in the course of employment. Respondent asserts that at his home, claimant takes the trash out in the same manner as he does at work. The specific activity in which the claimant was engaged at the time of his injury was walking down the stairs, which is an activity that is not limited to the work claimant performed for respondent. Undoubtedly, claimant had to descend steps and take out trash when he was not working and in that sense the claimant's injury and disability were consequences of an activity of day-to-day living. The Kansas Supreme Court in *Bryant*[6] instructs that the analysis should not end with that determination. The court found that the focus of the inquiry is not on an isolated movement but rather on the overall context of what claimant was doing and whether that activity is connected to or inherent in the performance of his job.

In the present claim, respondent ignores two important facts. First, one of claimant's required job duties is to take out the bags of trash. Second, when claimant takes the trash out at work, he hurries to take the trash out so as not to lose visual contact with the juveniles he is charged with supervising. At home, claimant is not supervising juveniles and can take the trash out at whatever pace he desires.

Respondent argues that when he fell at work, claimant was engaged in a neutral risk activity and compares the facts of the present claim to those in *McCready*.[7] On her way back from an appointment with a doctor because of a previous work-related accident,

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[4] K.S.A. 2011 Supp. 44-534a.

[5] K.S.A. 2011 Supp. 44-555c(k).

[6] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 595-96, 257 P.3d 255 (2011).

[7] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

McCready was injured when she fell on a handicapped walkway leading to the front door of Payless. The Kansas Court of Appeals determined claimant's fall was unexplained and, therefore, constituted a neutral risk. Here, there is an explanation for claimant's fall. While claimant was engaged in a required work activity he took a misstep and rolled his ankle. McCready, on the other hand, was merely walking back to Payless and was not engaged in a work activity.

This Board Member finds claimant was engaged not in a neutral risk activity, but an activity associated with his job. Claimant was carrying trash bags and moving at a faster pace than he did when taking out trash at his home. Claimant carried two trash bags at once to get back to the unit quickly. As the Court stated in *Bryant*:

> Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the *[sic]* whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement[–]bending, twisting, lifting, walking, or other body motions[–]but looks to the overall context of what the worker was doing[–]welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.[8]

Respondent asserts the ALJ exceeded her authority and/or jurisdiction in authorizing medical treatment for claimant. In its brief respondent asserts, "The Board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the Workers' Compensation Act."[9] This statement disregards the jurisdictional limits imposed upon the Board by the Kansas Legislature in K.S.A. 44-534a and amendments thereto and K.S.A. 2011 Supp. 44-551.

The ALJ has the authority pursuant to K.S.A. 44-534a and amendments thereto to make a preliminary award of medical compensation and temporary total disability benefits. Therefore, respondent's argument that the ALJ exceeded her authority and/or jurisdiction in authorizing medical treatment for claimant is without merit. This Board Member finds the ALJ neither abused her discretion nor acted outside the scope of her jurisdiction. Neither K.S.A. 44-534a and amendments thereto nor K.S.A. 2011 Supp. 44-551 confers jurisdiction upon the Board to review whether an ALJ's preliminary award of medical benefits is reasonable or necessary. Accordingly, respondent's application for Board review on this issue is dismissed.

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[8] *Bryant*, 292 Kan. at 596.

[9] Respondent's Brief at 1 (filed Feb. 20, 2012).

CONCLUSION

1. Claimant proved by a preponderance of the evidence that he sustained a right ankle injury by accident on August 21, 2011, arising out of and in the course of his employment with respondent.

2. The ALJ did not exceed jurisdiction and/or authority by ordering medical treatment for claimant. The Board does not have jurisdiction to review this issue and, therefore, dismisses respondent's application for review on this issue.

WHEREFORE, the undersigned Board Member affirms the January 17, 2012, Preliminary Hearing Order entered by ALJ

IT IS SO ORDERED.

Dated this ____ day of April, 2012.

BOARD MEMBER

c:

BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JASMINE R. GRAVES	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,059,190
PROFESSIONAL SERVICE INDUSTRIES, INC.	)	
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the February 23, 2012 preliminary hearing Order entered by Administrative Law Judge

ISSUES

The Administrative Law Judge (ALJ) denied claimant's preliminary hearing requests, finding that claimant failed to sustain her burden of proof of personal injury by accident on September 27, 2011, which arose out of and in the course of her employment with respondent. The ALJ concluded that the act of getting out of a vehicle did not constitute a risk peculiar to the job.

The claimant requests that the Board reverse the Order and find claimant's injury arose out of and in the course of her employment and order respondent to pay temporary total disability compensation benefits and the unpaid medical treatment bills.

Respondent argues that the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent in mid-March 2011, as a field inspector. Her job was to test construction materials. She was given a company vehicle to travel to the construction sites. Claimant testified that on average she gets in and out of the company vehicle 20 or 30 times per day. She testified that the surfaces she exits her vehicle on to vary from loose dirt to loose gravel to pavement and grass.

Claimant injured her right knee on September 27, 2011, as she stepped out of her vehicle to take some soil densities, and felt a pop in her right knee. Claimant felt an immediate sharp and shooting pain in her knee. She was unsure of the surface that she steeped onto, testifying that it could have been pavement, loose gravel or the edge of some grass.

When claimant exited the vehicle she was in the process of making her way to the back of her vehicle to pull out a nuclear gauge to test for soil density moisture content. This is a piece of equipment used on a regular basis in the performance of her job for respondent.

Claimant immediately reported the accident and injury to respondent and was sent to K-Stat, a medical clinic in Manhattan, Kansas, to be checked out. She was given temporary light restrictions and returned to work. Later claimant was referred to Daniel T. Hinkin, M.D., at the Orthopedic & Sports Medicine Center in Manhattan, Kansas. Claimant was taken off work from October 21, 2011 through November 1 or 2, 2011. She then returned to work until December 8, 2011, when she was told that workers compensation denied her claim. At that time claimant was restricted from work until she was released by her doctor to full activity with no undue restrictions.[1]

Claimant had surgery on her right knee with Dr. Hinkin on December 21, 2011, and was placed on light duty with temporary restrictions, but has not worked since December 8, 2011. Claimant continues to have problems with her right knee. She denies any previous knee problems.

Claimant received additional treatment for her right knee because she developed a blood clot after surgery. She was prescribed blood thinners and her condition is being monitored by Dr. Jacqi Seaton. Claimant testified that she is able to work within her restrictions, but respondent will not take her back with restrictions.

[1] P.H. Trans. at 12-13.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.[4]

K.S.A. 2011 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 508(f)(1)(2)(B)(3)(A) states:

> (f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
>
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> (A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

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[2] K.S.A. 2011 Supp. 501b and K.S.A. 2011 Supp. 44-508(h).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2011 Supp. 501b(b).

(I) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(I) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(I) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2011 Supp. 44-508(g)(h) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

It is uncontroverted that claimant suffered an injury as above defined. When she stepped out of the truck, she experienced an immediate onset of pain in her right knee. Ultimately, claimant was forced to undergo surgery to repair the damage.

The question is whether this injury arose out of her employment. As the accident and resulting injury occurred as claimant was getting out of her employer provided truck, to retrieve an piece of equipment for the specific purpose of performing one of the duties of her job, it would seem that the accident occurred in the course of her employment. However, the Kansas legislature has significantly amended the Kansas Workers Compensation Act (Act), applying a stricter burden to claimant than before.

The ALJ, in the February 23, 2012 Preliminary Hearing Order, determined that the accident and resulting injury were the result of a risk which was "not particular to the job". Thus, the ALJ apparently concluded that the risk was of a neutral nature. Under the new version of K.S.A. 44-508(f)(3), a neutral risk is no longer compensable in Kansas. Additionally, an idiopathic injury is no longer compensable. Here, claimant felt a sudden pain in her knee. But she was unable to identify the cause of the injury. She did not describe a slip on a slick surface, nor did she describe a trip, twist, slip or any other cause for the onset of her knee pain other than simply stepping out of the truck. Claimant was not even able to describe the surface she placed her foot on. The determination by the ALJ that the 2011 version of K.S.A. 44-508(f) prohibits an award in this matter is affirmed. Claimant has failed to satisfy her burden of proving that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. The denial of benefits is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. The denial of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated February 23, 2012, is affirmed.

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[5] K.S.A. 2011 Supp. 44-534a(a)(2).

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

BOARD MEMBER